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Status: GRANTED

Title: Price Waterhouse, Petitioner  
v.  
Ann B. Hopkins

Docketed:  
January 12, 1988

Court: United States Court of Appeals for  
the District of Columbia Circuit

Counsel for petitioner: Bator, Paul M.

Counsel for respondent: Heller, James H.

NOTE: Ext. of time filed on 12/10/87 & granted on  
12/11/87 by Rehnquist, CJ, until 1/12/88 cited

Entry	Date	Note	Proceedings and Orders
1	Dec 10 1987		Application for extension of time to file petition and order granting same until January 12, 1988 (Chief Justice, December 11, 1987).
2	Jan 12 1988	G	Petition for writ of certiorari filed.
3	Feb 11 1988		Brief of respondent Ann B. Hopkins in opposition filed.
4	Feb 17 1988		DISTRIBUTED. March 4, 1988
5	Feb 18 1988	X	Reply brief of petitioner Price Waterhouse filed.
6	Mar 7 1988		Petition GRANTED. Justice Stevens OUT. *****
8	Mar 18 1988		Order extending time to file brief of petitioner on the merits until May 5, 1988.
19	Mar 18 1988		DEFERRED APPENDIX METHOD TO BE USED.
9	May 4 1988		Brief amicus curiae of Equal Employment Advisory Council filed.
10	May 5 1988		Brief of petitioner Price Waterhouse filed.
11	May 5 1988		Brief amicus curiae of United States filed.
13	May 11 1988		Order extending time to file brief of respondent on the merits until June 18, 1988.
14	Jun 17 1988		Brief amicus curiae of Committees of the Association of the Bar of the City of NY filed.
15	Jun 17 1988		Brief amici curiae of NOW Legal Defense Fund, et al. filed.
16	Jun 17 1988		Brief amicus curiae of American Psychological Association filed.
17	Jun 17 1988		Brief of respondent Ann B. Hopkins filed.
18	Jun 18 1988		Brief amicus curiae of AFL-CIO filed.
20	Jun 30 1988		Joint appendix filed.
21	Jun 30 1988		Lodging received.
23	Jul 18 1988		Reply brief of petitioner Price Waterhouse (TBP) filed.
24	Jul 20 1988		Record filed.
		*	Certified original record received.
25	Aug 18 1988		CIRCULATED.
26	Aug 29 1988		Set for argument. Monday, October 31, 1988. (4th case) (1 hr)
27	Oct 31 1988		ARGUED.

87 - 1167

No.

Supreme Court, U.S.

FILED

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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS, RESPONDENT

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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### QUESTION PRESENTED

In this case petitioner Price Waterhouse was held to have violated Title VII of the Civil Rights Act of 1964 because of its failure to make respondent Hopkins a partner in the firm. Although Price Waterhouse was held to have established a legitimate, nondiscriminatory, non-pretextual reason for that decision, the court of appeals characterized the case as one involving "mixed motives" for the employment decision because the firm's decision-making process included some unconscious and unquantifiable measure of impermissible "sex stereotyping." The court of appeals held, 2-1, in conflict with the decisions of this Court and of other courts of appeals, that in a "mixed motive" case the plaintiff prevails unless the defendant shows—and shows by clear and convincing evidence—that impermissible bias was not a decisive cause of the employment decision.

The question presented is whether the court of appeals was in error in shifting the burden of persuasion on the issue of intentional discrimination to the defendant, and in defining that burden in accordance with the "clear and convincing" standard, even though the district court found that there existed a legitimate, nondiscriminatory, and nonpretextual reason for the employment decision, and even though there was no showing that discriminatory bias played any causal role in that decision.

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## In the Supreme Court of the United States

OCTOBER TERM, 1987

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 No.

PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS, RESPONDENT

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 PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT
 

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Price Waterhouse respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-39a) is reported at 825 F.2d 458. The opinion of the district court (Gesell, D.J.) (App. B, *infra*, 40a-62a) is reported at 618 F. Supp. 1109.

## JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 63a) was entered on August 4, 1987, and a petition for rehearing was denied on September 30, 1987 (App. D, *infra*, 65a). On December 11, 1987, Chief Justice Rehnquist extended the time for filing this petition to January 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



## STATEMENT

1. *Introduction.* The question presented by this petition involves the proper allocation of burdens of proof in Title VII cases, and is one on which the courts of appeals are in sharp conflict. Here a divided panel of the court of appeals (Edwards, J., and Joyce Hens Green, D.J., with Williams, J., dissenting) held that Price Waterhouse violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, when it declined to make respondent, Ann B. Hopkins, a partner in the firm. The court of appeals did not disturb the district court's factual finding that Price Waterhouse had established a legitimate, nondiscriminatory, and nonpretextual basis for its decision not to make Hopkins a partner, but it held that that showing was insufficient to negate liability under Title VII because the process by which Hopkins was considered for partnership may have included some unquantifiable measure of impermissible "sex stereotyping." Even though Hopkins presented no evidence of any illicit motivation on the part of any of the persons actually responsible for making the partnership decision at Price Waterhouse, the court of appeals characterized the case as one involving "mixed motives" on the basis of the testimony of an "expert \* \* \* in the field of [sex] stereotyping" (App. 53a) who purported to see "sex stereotyping" in some of the casual language used about Hopkins by a few individuals (none of them final decisionmakers in her case, and all but one of them *supporters* of her partnership bid). It then held that in such "mixed motive" cases (a) the defendant employer bears the burden of proving that unlawful bias was not the determinative factor in the challenged employment decision; and (b) that burden must be carried by "clear and convincing" evidence.

The first question before this Court is whether—and in what circumstances—the plaintiff in a Title VII action may be relieved of the ultimate burden of proving that

intentional discrimination was a but-for cause of the adverse employment action. Second, even if such a dramatic departure from this Court's Title VII precedents and the conventional rules of the legal system is appropriate in limited circumstances, the further question is whether the employer in such a case must negate unlawful bias by the extraordinary standard of clear and convincing evidence. There is a direct and highly confusing series of conflicts among the courts of appeals on both of these questions.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court allocated the burdens of proof and persuasion in Title VII disparate treatment cases. Emphasizing that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," the Court established a "division of intermediate evidentiary burdens" designed to resolve the "ultimate question" of intentional discrimination that a plaintiff must prove. *Burdine*, 450 U.S. at 253. First, the plaintiff must establish by a preponderance of the evidence a *prima facie* case of discrimination. The defendant is then permitted to meet that preliminary showing by "'articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection.'" *Burdine*, 450 U.S. at 253 (quoting *McDonnell Douglas*, 411 U.S. at 802). If the defendant comes forward with such evidence, the plaintiff may attempt "to demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. A plaintiff who makes such a showing by a preponderance of the evidence will have successfully carried her burden of proving that she was "the victim of intentional discrimination." *Ibid.*

In *Burdine*, however, the Court specifically "discussed only the situation in which the issue is whether *either*



illegal or legal motives, *but not both*, were the 'true' motives behind the decision." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 n.5 (1983) (emphasis added). Thus the Court has not yet expressly discussed the burdens of proof and persuasion in Title VII cases involving so-called "mixed-motive" situations—where, although there was a legitimate reason for the challenged employment action, it is alleged that there may also have existed an illegitimate motivation, and it is argued that Title VII was violated by the forbidden motive's presence.

In the absence of explicit guidance from this Court on that critical issue, the courts of appeals have adopted widely divergent analyses, allocating the burdens and setting the standards of proof in so-called "mixed-motive" Title VII cases in no fewer than five different ways. Some circuits require the plaintiff to prove by a preponderance of the evidence that the decisive "but-for" reason for the adverse employment decision was intentional discrimination. Other circuits require the same "but-for" showing, but they require it to be made by the defendant rather than the plaintiff. The court of appeals in this case aligned itself with the courts that put the burden on the defendant, but created yet another category by holding that that burden could be satisfied only by the extraordinary standard of clear and convincing evidence, rather than a preponderance of the evidence. Finally, some circuits draw a distinction between the liability and remedy phases of a case, holding that Title VII liability will be found whenever an impermissible motive was present to any extent, but permitting the defendant to avoid the imposition of affirmative relief (such as reinstatement or promotion) by showing that unlawful bias was not a but-for cause of the challenged decision. Here again, there is a split within the circuits on whether a defendant's burden of proof on the question of remedy must be carried by clear and convincing evi-

dence or may be satisfied by a preponderance of the evidence instead.

We discuss below the conflict among the circuits and the need for a definitive resolution by this Court (see pages 13-17, *infra*). First, however, we briefly describe the findings and conclusions of the courts below.

2. *The District Court's Findings.* Hopkins initiated this action in the United States District Court for the District of Columbia, claiming that unlawful sex discrimination was the cause of Price Waterhouse's decision not to advance her to partnership in 1982.<sup>1</sup> In response, Price Waterhouse showed that during her five-year period of employment with the firm her abrasive personality and deficient interpersonal skills created grave problems, making it particularly difficult for employees subject to her supervision to work harmoniously with her. One staff member (who testified *on Hopkins' behalf*) indicated that "it required 'diplomacy, patience and guts' to work with her." App. 46a (quoting 3/27/85 Tr. 434). The district court accepted this showing, agreeing with Price Waterhouse that Hopkins "had considerable problems dealing with staff and peers." App. 59a. Indeed, after carefully examining Hopkins' employment history at Price Waterhouse, the district court found that both "[s]upporters and opponents of her candidacy indicated that [Hopkins] was sometimes overly aggressive, unduly harsh, difficult

<sup>1</sup> Initially, Price Waterhouse decided only to place Hopkins' partnership candidacy on "hold" for at least a year, "to afford [Hopkins] time to demonstrate that she has the personal and leadership qualities required of a partner." App. 44a (citation omitted). Several months after that decision, however, two Price Waterhouse partners who had been key advocates of Hopkins' partnership bid decided instead to oppose it, and Hopkins' advocates concluded that reconsideration in the next year's partnership selection cycle would therefore be in vain. *The district court found that the decision not to reconsider was not discriminatory (id. at 48a), and Hopkins did not appeal that determination.*

to work with and impatient with staff." *Id.* at 43a-44a. The district court concluded that the complaints about Hopkins' "interpersonal skills were not fabricated as a pretext for discrimination" and that Hopkins' "conduct provided ample justification for the complaints that formed the basis of the [firm's] decision" that her partnership candidacy should be postponed for at least one year. *Id.* at 46a-47a.

The district court also rejected Hopkins' attempt, based on a comparison of her file with those of similarly situated men, to show that Price Waterhouse treated her differently from male candidates with abrasive or aggressive personalities. At the same time, however, the district court believed that some of the negative characterizations about Hopkins' foul language, arrogance, and impatience—*e.g.*, that she needed to take a "course in charm school"—reflected "unconscious" (App. 54a) but "discriminatory [sex] stereotyp[ing]." *Id.* at 57a. Still, the district court balanced this evidence against the record of acknowledged "deficiencies" in Hopkins' performance (*id.* at 46a)—deficiencies acknowledged not only by the district court but, at least in some cases, by Hopkins herself. *Ibid.* At the end of the day, the district court found, Hopkins had proved only that sex stereotyping "played an *undefined* role in blocking [her] admission to the partnership." *Id.* at 54a (emphasis added). Because of this weak showing, the district court found,

the Court cannot say that [Hopkins] would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations.

*Id.* at 59a.

The district court thus found that Hopkins had not shown that discrimination by Price Waterhouse *caused* the harm she was suing to redress: the evidence did not establish that she would have made partner even in the

absence of any sexual stereotyping or that such conduct was actually a motivating factor in Price Waterhouse's decision. (Indeed, the district court did not find even "unconscious" stereotyping on the part of any person at Price Waterhouse responsible for actually making the relevant decision about Hopkins.) Nevertheless, the district court found that Title VII was violated. The violation was deemed to arise from the confluence of three factors, none of which the court thought was discriminatory standing alone. First, "[c]omments influenced"—albeit "unconsciously"—"by sex stereotypes were made by partners." Second,

the firm's evaluation process gave substantial weight to these comments; and [third], the partnership failed to address the conspicuous problem of stereotyping in partnership evaluations. While these three factors might have been innocent alone, they combined to produce discrimination in the case of this plaintiff.

App. 58a. Price Waterhouse was found liable because, "[d]espite the fact that the comments on women candidates often suggested that the male evaluators may have been influenced by sex bias, the Policy Board never addressed the problem." *Id.* at 55a.

The defendant's liability was thus *not* predicated upon an employment decision shown to have been made on the basis of gender; the district court did not find that discrimination caused Hopkins' rejection. Price Waterhouse was found to have committed an intentional violation of Title VII solely by failing to counteract the unconscious sexism that the court read into the colloquialisms of some of her colleagues—none of them the ultimate decision-makers—commenting on her performance in the course of the evaluation process.

The district court's imposition of liability notwithstanding its failure to find that Hopkins' rejection was caused by discrimination is particularly troubling because of the way in which the existence of even "unconscious" sex



stereotyping was divined. The district court's insight into these unconscious elements of Price Waterhouse's partnership decisionmaking process came primarily from the testimony of Dr. Susan Fiske, "a well qualified expert" in the "field of stereotyping." App. 53a. Although Dr. Fiske had never met Hopkins, and made no inquiry whatever into the facts of Hopkins' actual performance at Price Waterhouse, her review of the written comments made by Price Waterhouse partners about Hopkins' performance enabled her to opine that the partners' negative statements about Hopkins' rudeness, arrogance, and abrasiveness were caused by sexual stereotypes rather than the reality that they accurately described. Dr. Fiske reached this conclusion by simply *excluding* from her consideration the actual evidence of Hopkins' behavior, evidence that persuaded even the district court that Hopkins' "conduct provided ample justification for the complaints" about her. *Id.* at 46a-47a. Here is a typical exchange:

Q. \* \* \* Some of these folks describe Miss Hopkins, as you have read back to me, as overbearing, arrogant, self-centered, abrasive, thinks she knows more than anyone in the universe, and potentially dangerous. Would you think it would be somehow a stereotypical decision to exclude such a person from the partnership if that was in fact true?

A. I am not qualified to say whether or not it is true \* \* \* [b]ecause I didn't observe her behavior.

3/28/85 Tr. 596-597.

As Judge Williams, dissenting below, observed, this means that "if an observer characterized someone as 'overbearing and arrogant and abrasive and running over people,' an expert such as Dr. Fiske could discern \* \* \* that [those comments] stemmed from unconscious stereotypes \* \* \* without meeting the subject of the comment or making any inquiry into a possible factual basis." App. 36a. Further, Dr. Fiske found forbidden motives even in the comments of partners who *supported* Hopkins'

partnership bid because their favorable comments were efforts "to overcome their stereotypical attitudes." *Id.* at 13a n.3 (citing 3/28/85 Tr. 565). It seems clear, therefore, that on this approach "no woman could *be* overbearing, arrogant or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes." App. 36a (Williams, J., dissenting).<sup>2</sup>

3. *The Court Of Appeals' Decision.* A divided panel of the court of appeals affirmed the district court's finding of liability as well as the theory upon which it was based. Most important for present purposes, the court expressly recognized that the causation issue was at the center of the case. Noting the split among the circuits as to where the burden of proof should be placed (App. 21a n.8), the court of appeals rejected Price Waterhouse's appeal only "[b]ecause Price Waterhouse could not demonstrate by clear and convincing evidence that impermissible bias was not the determinative factor" (*id.* at 25a). Price Waterhouse was held to have violated Title VII solely on the basis of the amorphous proposition that "stereotypical attitudes towards women had manifested themselves in connection with the partnership bids of other women and \* \* \* that these stereotypes had been brought to bear on

<sup>2</sup> Dr. Fiske's testimony was disturbing in yet another respect. Over Price Waterhouse's objection (3/28/85 Tr. 539), Hopkins was permitted to use Dr. Fiske as a "rebuttal" witness in a supposed effort to negate Price Waterhouse's showing that it had a legitimate, nondiscriminatory reason for its decision not to make Hopkins a partner. At this stage of the case, however, Hopkins should have been permitted only to attempt to prove that the reason articulated by Price Waterhouse was a pretext for discrimination. See *Burdine*, 450 U.S. at 256. In fact, Hopkins never attempted to prove pretext, and, as previously noted, the district court expressly found that the complaints about Hopkins' "interpersonal skills were *not* fabricated as a pretext for discrimination" (App. 46a) (emphasis added).

[Hopkins'] candidacy" (*id.* at 20a)—even though Hopkins had not proved that she would have been made a partner in the absence of stereotyping. Indeed, the court of appeals expressly refused to require Hopkins to make any such showing. Assigning to Title VII plaintiffs the burden of proof on every aspect of their cases, including causation, the court held, would "place an enormous, perhaps insurmountable, burden on Title VII litigants" (*ibid.*). Instead, the court of appeals shifted the burden to Price Waterhouse to negate by clear and convincing evidence a fact that the court acknowledged was "impossible to measure." App. 9a.<sup>3</sup>

In dissent, Judge Williams agreed that the central issue on appeal was causation, but observed that "the record here provided no causal connection between Hopkins' fate and such stereotyping as went on among Price Waterhouse's 662 partners." App. 29a.<sup>4</sup> Judge Williams also

<sup>3</sup> After being informed that she would not be repropose for partnership (see note 1, *supra*), Hopkins resigned from the firm. The district court held that Hopkins failed to prove that the decision not to repropose was a "constructive discharge," and it therefore ruled that Hopkins was not entitled to an order directing Price Waterhouse to make her a partner. App. 60a-61a. The court of appeals reversed this aspect of the district court's decision and remanded the case for further proceedings on the remedial phase of the case. *Id.* at 27a-28a.

<sup>4</sup> As Judge Williams noted, "[t]he only remark by a Hopkins opponent that can be characterized as manifesting sexual stereotyping is the facetious suggestion that she should take a 'course at charm school.' The smoke from this gun seems to me rather wispy. It was embedded in the following comment:

Contacts with Ann are only casual—several mtgs at OGS and MMGS sessions. However, she is consistently annoying and irritating—believes she knows more than anyone about anything, is not afraid to let the world know it. Suggest a course at charm school before she is considered for admission. I would be embarrassed to introduce her as a ptrn."

App. 33a (emphasis added). The majority was able to find evidence of sex stereotyping in the "charm school" remark only by resorting

was troubled by Dr. Fiske's impressive claim that she was "able to find forbidden stereotyping simply by reading partners' comments—without information about the truth of the matters commented upon." *Id.* at 36a. Finally, Judge Williams objected to the majority's willingness to find that the mere presence of stereotypes would result in Title VII liability unless the employer undertook "to institute special programs for sensitizing partners to sex stereotyping or otherwise to stamp it out of the evaluation process." *Id.* at 37a. Judge Williams suggested that,

[i]f such an omission is to ground liability, perhaps the plaintiff should bear an initial burden of demonstrating that gender stereotyping was more probably than not the cause of the adverse employment decision. \* \* \*

From the facts here, it looks as though the duty to sensitize has a hair trigger. The implications are serious. The more delicate the trigger, the more completely this court has dropped the requirement of intentional discrimination out of the law. \* \* \* The rule turns Title VII from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts.

*Ibid.*

#### REASONS FOR GRANTING THE PETITION

In conflict with decisions of this Court and of other courts of appeals, the court of appeals in this case incorrectly decided questions of great importance to the administration of the civil rights laws. This Court has held

to Webster's definition, not of that term, but of the term "finishing school." See App. 13a n.4. But Webster's defines "charm school" in sex-neutral terms, stating simply that it is "a school in which social graces are taught." Webster's Third New International Dictionary 378 (1986). The majority did not explain why it would be discriminatory for Price Waterhouse to insist that all of its partners, male and female, be schooled in the social graces.



that the burden of persuasion in Title VII cases remains at all times with the plaintiff. *Burdine*, 450 U.S. at 256. The court of appeals' decision contravenes that principle in at least three ways. First, the court's decision requires the *defendant* to prove that discrimination did *not* cause the adverse employment decision, rather than requiring the plaintiff to prove that it did. Second, even if it were appropriate to relieve the plaintiff of the ultimate burden of persuasion on the question of causation in specific, narrow circumstances, the court of appeals erred gravely by requiring the defendant to make its showing by clear and convincing evidence. Third, the court of appeals improperly evaded the holding of *Burdine* by characterizing this case as one of "mixed motives" on the basis of impalpable evidence of supposed sexism—discernible only through an "expert" judgment that in fact ignored most of the *actual* evidence in the case—that was not shown to have had a causal impact on the disputed employment decision. The net effect of the court of appeals' decision is to place a virtually insurmountable burden on an employer, even where there exists overwhelming evidence of a legitimate, nondiscriminatory, and nonpretextual basis for its refusal to promote a Title VII plaintiff.

The circuits are in total disarray on the appropriate allocation of the burdens and standards of proof in so-called "mixed-motive" cases, adopting no fewer than five different approaches to this issue. Review by this Court is needed to abate this confusion. And review is particularly appropriate in this case because, among the possible approaches to this problem, the court below chose one that clearly violates this Court's precedents and cannot be squared with the policies of Title VII. Accordingly, review by this Court is warranted.

#### A. The Conflict Among The Circuits Requires Resolution By This Court.

As the court of appeals recognized (App. 20a-21a & n.8), the circuits are in conflict on the question whether a Title VII plaintiff must prove that impermissible discrimination was a "but-for" cause of a challenged employment decision.<sup>5</sup> Lacking a uniform rule, the courts of appeals have devised no fewer than five inconsistent ways to resolve cases in which it is argued that the defendant acted on the basis of both a lawful and an unlawful motive.

The first approach is based on this Court's statement in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976), that, for a Title VII plaintiff to prevail, "no more is required to be shown than that race was a 'but for' cause" of the challenged employment decision. The Third, Fourth, Fifth and Seventh Circuits draw their rule in mixed-motive cases from this observation, holding that "a [Title VII] plaintiff must show that his status as a minority class was the but for reason for the treatment accorded." *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 179 (3d Cir. 1985), cert. denied, 475 U.S. 1035 (1986) (emphasis added) (citing *Lewis v. University of Pittsburgh*, 725 F.2d 910, 916 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984), and noting the "considerable confusion" regarding the proper standard of proof in Title VII cases). Accord *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365-366 (4th Cir. 1985) ("[f]or the employee to disprove a legitimate

<sup>5</sup> Although the court of appeals recognized the existence of a conflict, it did not fully describe the extent of that conflict, nor did it evidence any awareness that the conflict embraces two separate questions: first, whether the plaintiff or the defendant bears the burden of proving causation in a "mixed-motive" case and, second, whether the standard of proof by which that burden must be met is a preponderance of the evidence or clear and convincing evidence. Compare pages 13-16, *infra*, with App. 21a n.8.



nondiscriminatory explanation for adverse action, the third stage of the *Burdine* analysis, we determine that he must show that the adverse action would not have occurred 'but for' the protected conduct");<sup>6</sup> *Jack v. Texaco Research Center*, 743 F.2d 1129, 1131 (5th Cir. 1984) ("the employee will prevail only by proving that 'but for' the protected activity she would not have been subjected to the action of which she claims"); *McQuillen v. Wisconsin Education Ass'n Council*, 830 F.2d 659, 664 (7th Cir. 1987) ("the employee must establish that the discriminatory motivation was a determining factor in the challenged employment decision in that the employee would have received the job absent the discriminatory motivation").

The second approach, adopted by the First, Sixth and Eleventh Circuits, turns on the same "but-for" inquiry but reverses the burden of proof. These courts require the defendant to show by a preponderance of the evidence that, even without the forbidden motive, it would have made the same employment decision. *Fields v. Clark University*, 817 F.2d 931, 936 (1st Cir. 1987) (once plaintiff proves "that unlawful discrimination was a motivating factor in the employment decision \* \* \* the defendant must prove that the same decision would have

<sup>6</sup> In an earlier case, the Fourth Circuit appeared to adopt the rule followed in the Ninth Circuit (see page 16, *infra*), holding that, "[o]nce a plaintiff establishes that she was discriminated against, the defendant bears the burden of showing [by clear and convincing evidence] that the plaintiff would not have been promoted even in the absence of discrimination." *Patterson v. Greenwood School Dist.* 50, 696 F.2d 293, 295 (4th Cir. 1982). Although the Fourth Circuit has never overruled *Patterson*, it has cited that decision only twice since it decided *Ross*—once in a dissenting opinion and once in dictum. See *Davis v. Richmond, Fredericksburg & Potomac R.R.*, 803 F.2d 1322, 1332 (1986) (Haynsworth, J., dissenting); *Soble v. University of Maryland*, 778 F.2d 164, 166 n.4 (1985) (dictum). *Ross*, therefore, apparently represents prevailing Fourth Circuit law. The situation in the Fourth Circuit confirms the extent of confusion and disarray among the courts of appeals.

been made absent the discrimination"); *Terbovitz v. Fiscal Court of Adair County*, 825 F.2d 111, 115 (6th Cir. 1987) (quoting *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985)) (if plaintiff shows the presence of an illegal motive, "the burden shifts to the employer to prove by a preponderance of the evidence 'that the adverse employment action would have been taken even in the absence of the impermissible motivation'"); *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1557 (11th Cir. 1983), cert. denied, 467 U.S. 1284 (1984) (quoting *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982), for the proposition that "[o]nce an [illegal] motive is proved to have been a significant or substantial factor in an employment decision, defendant can rebut only by proving by a preponderance of the evidence that the same decision would have been reached even absent the presence of that factor" (emphasis added by the *Birmingham Linen* court)).

The District of Columbia Circuit likewise requires the defendant in a mixed-motive case to prove that it would have made the same employment decision even absent the proscribed motivation. App. 23a-25a. But that court goes further, requiring that the showing be made not by a preponderance of the evidence but by clear and convincing evidence. *Id.* at 25a.

Finally, the Eighth and Ninth Circuits draw a distinction between the liability and remedy phases of a Title VII case. The Eighth Circuit holds that Title VII liability is established whenever an illegal motive is present in an adverse employment decision, even if the same decision would have been made in the absence of the forbidden motive. *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985) (en banc). The finding of liability will entitle the plaintiff to at least some relief, such as "a declaratory judgment, partial attorney's fees, and injunctive relief" (*id.* at 1324). But a defendant in the Eighth Circuit can avoid the award of retroactive promotion or reinstatement

and back pay by showing by a preponderance of the evidence that it would have taken the same employment action in any event. *Id.* at 1324 & n.5.

The Ninth Circuit employs an essentially similar analysis, but it permits the defendant to avoid the imposition of affirmative relief only if it can prove by clear and convincing evidence, rather than by a preponderance of the evidence, that it would have made the same decision even in the absence of the prohibited motivation. *Fadhl v. City & County of San Francisco*, 741 F.2d 1163, 1165-1166 (9th Cir. 1984); *Muntin v. California Parks & Recreation Dep't*, 738 F.2d 1054, 1055-1056 (9th Cir. 1984); see also *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 787 n.1 (9th Cir. 1986).

As the foregoing summary demonstrates, the lower courts are in need of guidance on the proper standards and allocation of burdens of proof for mixed-motive Title VII claims, being divided in several different ways. Some assign the but-for burden to the plaintiff; some to the defendant. Some hold that the but-for inquiry is irrelevant in the liability context, but dispositive at the remedy stage. Finally, even those circuits that agree that the defendant must make the but-for showing at some phase of the litigation cannot agree on the standard of proof: some hold that the defendant must make its showing by clear and convincing evidence, while others require only a preponderance.<sup>7</sup>

The district court's factual findings in this case—that atmospheric sexism could be detected in some of the written evaluations of Hopkins' performance, but that Hop-

<sup>7</sup> The Solicitor General recently noted the existence of this latter conflict in his Brief in Opposition (at 8 n.4) in *Haskins v. United States Dep't of the Army*, cert. denied, No. 86-1626 (Oct. 5, 1987). As the government there explained, *Haskins* was an inappropriate case in which to resolve the conflict because the plaintiff in that case received the benefit of the clear and convincing standard and yet still failed to win her case.

kins did not show that she would have been asked to be a partner even absent that factor—clearly present the issues that must be resolved. The instant case is therefore well suited to enable this Court to provide the necessary guidance.<sup>8</sup>

**B. This Court's Precedents Dictate That A Title VII Plaintiff May Prevail Only By Showing That Discrimination Was A But-For Cause Of The Challenged Employment Decision.**

*Burdine's* statement that the plaintiff retains the "ultimate burden of persuading the court that she has been the victim of intentional discrimination," 450 U.S. at 256, precludes a Title VII defendant from being saddled with the burden of persuasion on the question of causation. As *Burdine* itself explained, the intermediate burden placed on a defendant is merely one of production: the defendant must come forward with evidence that it had a legitimate reason for the challenged employment decision, but the defendant need not prove anything. Thus, the Court stated,

[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. \* \* \* If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted \* \* \*.

*Id.* at 254-255 (citation and footnotes omitted).

The ultimate issue in a case like this one is the same as the ultimate issue in a case like *Burdine*: did discrimination cause the plaintiff's injury? *Burdine* teaches

<sup>8</sup> A ruling in this case from this Court would be important not only for private employers, but also for the federal government, in light of the large number of Title VII cases brought in the District of Columbia against the federal government in its capacity as the nation's largest employer.



that the plaintiff bears the burden of proving an affirmative answer to that question. Of course, a forbidden motive cannot have caused an injury if the employment decision would have been the same in any event. If the law requires a plaintiff to prove that discrimination caused her injury, the same law must necessarily require the plaintiff to show that without discrimination the injury would not have occurred.

This rule—that the party with the burden of persuasion must at a minimum show but-for causation—is the conventional tort rule. Indeed,

the “but-for” or “sine qua non” rule \* \* \* [is] [a]t most \* \* \* a rule of exclusion: if the event would not have occurred “but for” the defendant’s negligence, it still does not follow that there is liability.

W. Prosser, *The Law of Torts* 238-239 (4th ed. 1971).<sup>9</sup> The same rule should be applied here.

*Burdine* instructs that the burden of proof is allocated in discrimination cases in the same way it is allocated in other kinds of civil litigation. This Court has on other occasions relied on analogies to tort or other civil law in deducing the rules to govern cases brought under Title VII. See, e.g., *United States Postal Service v. Aikens*, 460 U.S. 711, 716 (1983) (cautioning that the differences between Title VII litigation and other cases does not mean “that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact”); see also *Anderson v. City of Bessemer*, 470 U.S. 564 (1985) (clearing erroneous standard of review applies with the same force in Title VII litigation as in other civil cases).

<sup>9</sup> An exception is the case in which either of two actions is independently sufficient to cause an injury. See Prosser, *supra*, at 240; H.L.A. Hart & A. Honore, *Causation in the Law* 107 (1973). That exception is irrelevant here.

Removing the causation burden from the plaintiff has highly undesirable consequences. The antidiscrimination laws address intentions as well as conduct, and some efforts will therefore be necessary under any rule to ascertain the defendant’s motivation. But an affirmative finding that the defendant violated the law (and should therefore be subject to governmentally imposed sanctions) by discriminating in an employment decision, even where there existed a wholly legitimate and non-pretextual basis for that decision, should be based on fair and substantial evidence that intentional discrimination played a decisive role; it should not be based on fragmentary evidence of possible sexist factors that are artificially leveraged into a finding of “intention discrimination” by a shift in the burden of persuasion. Title VII was not designed to prevent employers from basing employment decisions on legitimate, job-related, nondiscriminatory factors; if one of these exists and is shown to be nonpretextual, the employment decision should not be overturned without a fair affirmative basis for believing that that decision would not have been made without the presence of a prohibited motive.

Further, without a fair affirmative showing of causation, liability will have been imposed solely because of perceived “discrimination in the air”—because of vague notions of “societal discrimination” that have not been shown to have harmed the plaintiff directly. This Court has repeatedly refused to adopt such a standard. *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1848 (1986) (opinion of Powell, J.); *Regents of the University of California v. Bakke*, 438 U.S. 265, 307-308 (1978) (opinion of Powell, J.). See also *Fields v. Clark University*, 817 F.2d 931, 935 (1st Cir. 1987) (proof that “the [challenged] decision was infected with discrimination” does not necessarily entitle plaintiff to relief). Indeed, the express language of Title VII itself precludes a finding of liability in the absence of proof of causation. The statute

provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's \* \* \* sex" (42 U.S.C. § 2000e-2(a)(1) (emphasis added)). Further, Title VII expressly prohibits courts from requiring "the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, *if such individual was refused \* \* \* employment or advancement \* \* \* for any reason other than discrimination on account of \* \* \* sex*" (42 U.S.C. § 2000e-5(g) (emphasis added)). As the Seventh Circuit recognized, the language of "Title VII contains a clear causal requirement between discriminatory motivation and the challenged employment decision." *McQuillen*, 830 F.2d at 664. The court of appeals' decision in this case, relieving plaintiff of the burden of proving causation, cannot be reconciled with these express statutory limitations on the reach of Title VII.<sup>10</sup>

<sup>10</sup> We recognize that in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977), the Court held that once a plaintiff has shown that constitutionally protected conduct was a "substantial" or "motivating" factor in an adverse employment decision, the burden shifts to the defendant to prove, by a preponderance of the evidence, that it would have made the same employment decision even in the absence of the protected conduct. Similarly, in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Court accepted the NLRB's position that once the General Counsel of the Board has proved that conduct protected by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, was a "substantial" or "motivating" factor in the discharge of an employee, the burden shifts to the employer to prove, by a preponderance of the evidence, "that the discharge would have occurred in any event and for valid reasons" (462 U.S. at 400). These cases, however, did not address the specific language of Title VII, and thus they do not govern the question presented here. And even if *Mt. Healthy* and *Transportation Management* were thought to support shifting the burden of proof to the defendant in a Title VII case, the most that could be required of the employer under those cases is proof *by a preponderance of the evidence* that the employment decision would have been

**C. Even If A Defendant Must Show That The Same Decision Would Have Been Made Without The Forbidden Motive, The Court Of Appeals Erred By Requiring That That Showing Be Made By Clear And Convincing Evidence.**

The Court has made it clear that the interests at issue in a Title VII case, while important, do not justify departure from the settled rules governing "the basic allocation of burdens and order of presentation of proof." *Aikens*, 460 U.S. at 716 (quoting *Burdine*, 450 U.S. at 252). The *Aikens* Court stated:

All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. *But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.*

460 U.S. at 716 (emphasis added). See also *id.* at 718 (Blackmun, J., concurring) ("the ultimate determination of factual liability in discrimination cases should be no different from that in other types of civil suits").

This Court has consistently affirmed that the preponderance of the evidence standard is the burden generally imposed in civil litigation. See *Rivera v. Minnich*, 107 S.Ct. 3001, 3003 (1987) (footnote omitted) ("[t]he preponderance of the evidence standard \* \* \* is the standard that is applied most frequently in litigation between private parties in every state"); *id.* at 3003 n.5 (citing E. Cleary, *McCormick on Evidence* 956 (3d ed. 1984), for the proposition that the preponderance standard applies "to 'the general run of issues in civil cases'"); *Her-*

the same; the court of appeals' imposition of the *clear and convincing* standard finds no support whatever in this Court's precedents.



*man & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983). The preponderance standard is typically applied even when the defendant can lose his livelihood if the decision goes against him, so long as the proceeding is civil rather than criminal. *Steadman v. SEC*, 450 U.S. 91 (1981). The court of appeals' decision in this case to hold Price Waterhouse to the clear and convincing standard cannot be reconciled with this rule. The fact that the standard was imposed upon the defendant, rather than the plaintiff, makes the error all the more egregious.<sup>11</sup>

In certain limited and unusual circumstances, the Court has required the *plaintiff* in a civil proceeding to prove his case by clear and convincing evidence. See *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (defamation); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization).<sup>12</sup> In these cases this Court recognized that where

<sup>11</sup> Because the ultimate issue in discrimination cases will often turn on the defendant's state of mind, the Court in *Aikens* analogized the factual questions at issue in such cases to those presented in cases of misrepresentation. 460 U.S. at 716. The law of fraud, of course, has departed from the preponderance standard; but it did so by requiring the *plaintiff* to prove his case by clear and convincing evidence. See *Herman & MacLean v. Huddleston*, 459 U.S. at 388 n.27.

<sup>12</sup> When a public body charged with violating Title VII has a history of de jure segregation, it has been held appropriate to require the defendant to prove by clear and convincing evidence that the challenged employment decision was made on the basis of race-neutral criteria. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 209 (1973) (citing *Chambers v. Hendersonville City Bd. of Educ.*, 364 F.2d 189, 192 (4th Cir. 1966) (en banc)). This rule, of course, is entirely irrelevant in this case, because the district court did not purport to find a past history of discrimination at Price Waterhouse. See *Lujan v. Franklin County Bd. of Educ.*, 766 F.2d 917, 925-929 (6th Cir. 1985) (explaining that, after *Burdine*, the *Cham-*

a plaintiff seeks certain affirmative, coercive, interventions, the courts may deny their aid unless the intervention is shown to be warranted under a rigorous evidentiary standard. But in this case such an evidentiary standard was imposed on a *defendant* who is *resisting* the imposition of coercive governmental sanctions. Given the Court's insistence that Title VII cases are not different from other private rights of action, it is a startling step in the *wrong* direction to say to a Title VII defendant that it will be deemed to have violated the law, and will thus be subject to sanctions, unless it can show by clear and convincing evidence that it was not guilty of intentional discrimination.

#### **D. The Court Of Appeals Evaded This Court's Decision In *Burdine* By Improperly Characterizing This Case As One Involving "Mixed Motives."**

With virtually no supporting precedent, the court of appeals in this case adopted an approach to the burden of proof issue that makes it essentially impossible for an employer to win a Title VII case of this type. Not only did the court place the burden on the defendant employer to prove a negative—that an improper motive was *not* the determinative factor in the adverse employment action—but it also required this showing to be accomplished by the extraordinary standard of clear and convincing evidence. More startling still, these Draconian rules were applied in a context where the evidentiary record failed wholly to provide a fair and plausible basis

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bers doctrine is applicable only in pattern or practice and disparate impact cases). See also *Love v. Alamance County Bd. of Educ.*, 757 F.2d 1504, 1508-1510 (4th Cir. 1985) (explaining the kind of de jure segregation a public body must have imposed before the *Chambers* doctrine becomes relevant). Given the district court's rejection in this case of all of Hopkins' comparative evidence, the discussion in *Alamance County* makes clear that Hopkins could not have satisfied the requirements it imposes even if she had sought to apply the doctrine here.



for the conclusion that impermissible motives in fact played a significant causal role at all in the employment decision.

In this case the court of appeals did not disturb the district court's findings that, *first*, Price Waterhouse had established a legitimate, nondiscriminatory, and nonpretextual basis for its decision not to make Hopkins a partner; *second*, Hopkins had not proved that she would have been made a partner in the absence of sex "stereotyping"; and *third*, a Title VII violation had occurred solely because some participants in the evaluation process (but not the actual decisionmakers themselves) had engaged in unconscious and unquantifiable sex "stereotyping" and because the firm had not taken steps to eliminate this improper element from the environment.

The court of appeals then evaded *Burdine* by proceeding on this impalpable basis to characterize the case as one where "mixed motives" were present and a shift in the burden of proof therefore warranted. The difficulty is that virtually any case can be transformed into one of "mixed motives" on the showing made here.<sup>13</sup> The *Burdine* rule, which unequivocally places the ultimate burden

<sup>13</sup> As discussed above (pages 7-9, *supra*), Hopkins' expert witness reached her conclusion that various partners' statements were reflections of sex "stereotyping," rather than accurate observations drawn from direct contact with Hopkins, even though the witness herself had never met Hopkins and had no knowledge whatever of Hopkins' behavior at Price Waterhouse. Moreover, as Judge Williams demonstrated in his dissent (App. 31a-36a), the handful of statements upon which the expert relied for her "stereotyping" conclusion were, virtually without exception, either (1) made by Hopkins' supporters and therefore were unlikely to have adversely affected her partnership candidacy, or (2) made at a remote time and about other women who *did* become partners, or (3) made by persons outside the decisionmaking chain, so that no adverse effect on Hopkins could have occurred, and/or (4) made in a fashion so that the implications of the statements were either utterly benign or,

of persuasion in discrimination cases upon the plaintiff, will be effectively swallowed up by the "mixed-motive" exception; and the rule's evisceration is completed by the imposition upon the employer of the clear and convincing evidentiary standard.

Even if, in limited circumstances, a soundly based "mixed-motive" analysis is appropriate and consistent with *Burdine*, guidance from this Court is urgently needed concerning its proper scope. In the absence of such guidance, *Burdine* will simply disappear in a sea of "findings" of mixed motives. Particularly where, as here, the clear and convincing burden is placed upon the employer, the employer will have no opportunity fairly to contest Title VII cases based on the rules adopted by Congress as interpreted by this Court.

This Court has, in other contexts, had to deal with the problem of erosion in the general requirement of the legal system that findings may not be validated on the basis of "expert" intuitions in the absence of fair and substantial support in the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); and see Jaffe, *Judicial Review: Questions of Fact*, 69 Harv. L. Rev. 1020 (1956). Such erosion will certainly take place here in the absence of firm insistence by this Court that a finding of a Title VII violation must be based, at a minimum, on a fair and substantial showing in the record as a whole that the disputed employment decision was in fact caused by illegal discrimination, and that radical

at worst, ambiguous, requiring a healthy imagination to assign illicit motivation to them. For example, the only supposedly stereotypic remark made by a partner who actually opposed Hopkins' partnership candidacy consisted of a suggestion that she should take a "course at charm school." *Id.* at 6a, 33a. As Judge Williams observed, this remark was simply a "silly phrase" inserted in a much lengthier substantive comment that described Hopkins' difficult personality in terms that had "nothing to do with sex stereotypes." *Id.* at 33a. See also note 4, *supra*.

shifts in the placement and content of the burden of proof, themselves triggered almost entirely on the basis of intuitive speculations rather than on findings as to the employer's *actual* motives, cannot substitute for such a showing.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1988

## APPENDICES

1a

APPENDIX A

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

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Nos. 85-6052, 85-6097

ANN B. HOPKINS,

v.

*Appellant,*

PRICE WATERHOUSE

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ANN B. HOPKINS

v.

PRICE WATERHOUSE,

*Appellant.*

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Appeal from the United States District Court  
for the District of Columbia  
(Civil Action No. 84-3040)

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Argued Oct. 23, 1986

Decided Aug. 4, 1987

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Before EDWARDS and WILLIAMS, Circuit Judges,  
and JOYCE HENS GREEN,\* District Judge.

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\* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).



Opinion for the Court filed by District Judge JOYCE HENS GREEN.

Dissenting opinion filed by Circuit Judge WILLIAMS.  
JOYCE HENS GREEN, District Judge:

In *Hishon v. King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), the Supreme Court ruled for the first time that decisions concerning advancement to partnerships are governed by Title VII, 42 U.S.C. § 2000e, et seq., and must therefore be made without regard to race, sex, religion, or national origin. This case, the first challenge to a partnership denial to reach us since *Hishon*, presents several novel and important questions that arise from the application of federal employment discrimination law to collegial bodies such as partnerships. Following a five-day trial, the District Court found that Price Waterhouse, one of the nation's largest accounting firms, had discriminated against plaintiff Ann Hopkins by permitting stereotypical attitudes toward women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner. The court concluded that Hopkins was entitled to an award of backpay from the date she should have been elected partner until the date of her resignation seven months later, but ruled that, notwithstanding the parties' agreement to defer consideration of damages until after a decision on the issue of liability, Hopkins' failure to present any evidence as to the amount of compensation she was due barred her from recovering all damages save attorneys' fees. The trial court further found that Hopkins had failed to establish that she had been constructively discharged following Price Waterhouse's failure to make her a partner, and thus declined to award her backpay for the period subsequent to her resignation or to order Price Waterhouse to invite her to become a partner. The parties cross-appealed.<sup>1</sup> For

<sup>1</sup> For the sake of convenience, the court will refer to the parties as plaintiff and defendant, rather than appellant, cross-appellee, and appellee, cross-appellant.

the reasons set forth below, we affirm the District Court's determination of liability, but reverse its judgment as to the appropriate relief and remand for further proceedings on this issue.

## I.

### A. Background

Price Waterhouse is a professional partnership specializing in auditing, tax, and management consulting services, primarily for private corporations and government agencies. The firm is known colloquially as one of the nation's "big eight" accounting firms; at the time this suit commenced, it had 662 partners working in 90 offices across the country. Price Waterhouse is managed by a Senior Partner and Policy Board elected by all the partners. New partners are regularly drawn from the ranks of the firm's senior managers through a formal nomination and review process that culminates in a partnership-wide vote. There are no formal limits on the number of persons who may be made partners in any one year. *Hopkins v. Price Waterhouse*, 618 F.Supp. 1109, 1111 (D.D.C.1985).

Plaintiff joined Price Waterhouse as a manager in August 1978 and began working in its Office of Government Services (OGS) in Washington, D.C. She specialized in preparing, securing, and managing contracts for large-scale computer-based systems designed specifically for government agencies. Plaintiff had previously worked at Touche Ross, another large accounting firm where her husband was also employed, but left because that firm's rules prohibited both husband and wife from being considered for partnership. Shortly after her departure, plaintiff's husband became a partner at Touche Ross. In order to hire her, Price Waterhouse waived one of its own rules that barred employment of anyone whose spouse was a partner in a competing firm. In 1981, however, the firm advised plaintiff that, because of her husband's position at Touche Ross, she would not be eligible for partnership at Price Waterhouse. She threatened to re-

sign and the matter was resolved only because Hopkins' husband left Touche Ross to set up his own consulting firm. Plaintiff was nominated for partnership a year later, in August 1982.

There is no dispute that Hopkins was qualified for partnership consideration. She was exceptionally successful in garnering business for the firm, winning contract awards with the Department of State and the Farmers Home Administration worth an estimated \$34 to \$44 million to Price Waterhouse. The firm's Senior Partner, Joseph Connor, characterized one of these contracts—a world-wide computerized system capable of handling all State Department financial transactions—as a “leading credential” that enabled the firm to win similar business from other federal agencies. The District Court expressly found that none of the other candidates considered for partnership in 1983 had generated more business for Price Waterhouse than plaintiff. 618 F.Supp. at 1112. In addition, she billed more hours than any of the other candidates under consideration.

The partners in OGS formally initiated the admission process for plaintiff by nominating her for partnership in August 1982. In support of her candidacy OGS submitted a flattering appraisal of her work, highlighting her “outstanding performance” in connection with the State Department project, and strongly urging her admission to the partnership. The appraisal stated in part:

In her five years with the firm, she has demonstrated conclusively that she has the capacity and capability to contribute significantly to the growth and profitability of the firm. Her strong character, independence and integrity are well recognized by her clients and peers. Ms. Hopkins has outstanding oral and written communication skills. She has a good business sense, and ability to grasp and handle quickly the most complex issues, and strong leadership qualities.

Plaintiff's Exhibit (“Pl.Ex.”) 15.

After a local office such as OGS nominates one of its senior managers for partnership, Price Waterhouse circulates the nominee's name and the accompanying appraisal of his or her work to all partners, who are invited to comment on the candidate. Those partners who have worked closely or extensively with a candidate submit “long-form” evaluations, while those whose contact has been more limited submit “short-forms.” Partners are asked to rank individual nominees against all other candidates in 48 categories; to indicate whether the individual should be admitted, rejected, or placed on hold; and to provide written comments explaining their recommendations. The Admissions Committee, an arm of the firm's Policy Board, reviews each candidate's personnel file and occasionally interviews individual partners who have commented on a given candidate. The Committee then prepares a summary of the evaluations and makes its own recommendations to the Policy Board, providing a short written statement explaining any recommendation to hold or reject a candidate. The Policy Board in turn votes on whether the candidate should be included on the partnership ballot, held for reconsideration, or rejected. The Board can override the recommendations of the Admissions Committee and evaluates candidates not only on the basis of their individual merit, but also in terms of the firm's business needs. Those candidates who receive the Board's approval are placed on the ballot for a partnership-wide election; those who are not included are informed of the Board's reasons for rejecting or postponing their candidacies.

Plaintiff was the only woman among the 88 candidates nominated for partnership in August 1982. Of these, 47 were invited to join the partnership, 21 were rejected outright, and the remaining 20—including plaintiff—were placed on hold. Seventeen of the 19 men placed on hold were renominated the following year (the other two had been placed on two-year holds), and of these, 15 were ultimately admitted. OGS, however, did not renominate plain-



tiff. Of the thirty-two partners who submitted evaluations and comments on her candidacy, fully a fourth opposed her admission; another three partners recommended that she be held for reconsideration; and eight others stated that they lacked a sufficient basis upon which to form an opinion. 618 F.Supp. at 1113. Many of the comments from evaluating partners centered on Hopkins' apparent difficulties with staff, and both supporters and opponents of her candidacy characterized her as sometimes overly aggressive, unduly harsh, impatient with staff, and very demanding.

A number of these complaints about plaintiff's lack of "interpersonal skills" were couched in terms of her sex. One critic suggested that Hopkins needed to take a "course at charm school." Pl.Ex. 21. A supporter sought to excuse her behavior by speculating that "she may have overcompensated for being a woman." Defendant's Exhibit ("Def.Ex.") 31. A member of the Admissions Committee investigated a reference in Hopkins' personnel file about her use of profanity and testified that "several . . . partners" regarded her language as "one of the negatives." Transcript of Trial ("Tr.") 321. One supporter felt compelled to defend her on this subject, arguing that "[m]any male partners are worse than Ann (language and tough personality)"; this partner believed that the concerns over her profanity arose only "because she is a lady using foul language." *Id.* Another supporter opined that Hopkins initially came across as "macho," but concluded that "if you get around the personality thing she's at the top of the list or way above average." Still another supporter wrote that plaintiff "had matured from a tough-talking, somewhat masculine hard-nosed mgr. to an authoritative, formidable, but much more appealing lady partner candidate." Pl.Ex. 21.

Due to the large number of comments concerning her interpersonal skills, the Admissions Committee recommended that Hopkins' candidacy be held for at least a

year. The Policy Board concurred, noting that although plaintiff had "a lot of talent," she needed "social grace." Pl.Ex. 20. Shortly thereafter, plaintiff met with the firm's Senior Partner, Joseph Connor, to discuss the Board's decision, and he urged her to undertake a Quality Control Review, which would allow her to work with more partners, demonstrate her skills, and allay concerns about her ability to deal with staff. Prior to that meeting, Thomas Beyer, the head partner at OGS and perhaps Hopkins' most fervent supporter, discussed with her problems the Board had identified with her candidacy and the steps she might take to enhance her partnership prospects. Beyer advised her "to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 618 F.Supp. at 1117.

Four months after she embarked on her Quality Control Review, however, the partners at OGS decided not to propose Hopkins for partnership. During the year following her initial nomination, Hopkins lost the support of two of these partners, who had come to strongly oppose her candidacy. Although candidates have on occasion been admitted despite the opposition of partners in their home offices, plaintiff's supporters at OGS felt that in view of the strong criticisms her earlier nomination had drawn, she could not possibly become a partner without the unanimous endorsement of her local office partners. Beyer advised plaintiff that it was very unlikely that she would ever be admitted to the partnership. He told her that she could remain at Price Waterhouse as a senior manager, but one of the OGS partners who opposed her candidacy advised her to resign. That advice was consistent with the regular practice and custom at Price Waterhouse, where candidates rejected for partnership routinely left. Hopkins resigned in January 1984 and set up her own consulting firm.

### B. *Proceedings Below*

The District Court had no difficulty finding that plaintiff had presented a prima facie case of sex discrimination: she was a qualified partnership candidate, she was rejected, and Price Waterhouse continued to seek partners with her qualifications. 618 F.Supp. at 1113 (citing *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 875, 104 S.Ct. 2794, 2799, 81 L.Ed.2d 718 (1984); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981)). The court went on to find, however, that Price Waterhouse's consideration of Hopkins', or any other candidate's, interpersonal skills was a legitimate business inquiry, and that plaintiff's management style "provided ample justification for the complaints that formed the basis of the Policy Board's decision." 618 F.Supp. at 1114. The trial judge found that a number of the criticisms leveled at Hopkins because of her treatment of staff were in fact genuine. *Id.* In addition, the trial court concluded that the opposition of the two OGS partners to Hopkins' re-nomination was likewise based on genuine reservations about her management style rather than any animosity towards her because of her sex. *Id.* Finally, the District Court rejected Hopkins' contention that Price Waterhouse treated her differently than male candidates with abrasive or aggressive personalities. The trial judge concluded that the firm had legitimate, nondiscriminatory business reasons for admitting two such candidates identified by plaintiff, and dismissed evidence she proffered as to the two other male candidates as "fragmentary" and otherwise insufficient proof of disparate treatment.<sup>2</sup> *Id.* at 1115 & n. 6.

<sup>2</sup> The District Court also rejected Hopkins' evidence concerning the very small number of female partners at Price Waterhouse. The trial court found this evidence "wholly inconclusive" because it failed to indicate the percentage of female partners relative to the percentage of available qualified women, and failed to take

The trial court's finding of liability rested instead on its determination that Price Waterhouse had discriminated against Hopkins by filtering her partnership candidacy through a system that gave great weight to negative comments and recommendations, despite evidence that those comments reflected unconscious sexual stereotyping by male evaluators based on outmoded attitudes towards women. *Id.* at 1118-19. The District Court found that comments based on sexual stereotypes were "part of the regular fodder of partnership evaluations," yet Price Waterhouse took no steps to discourage sexism, to heighten the sensitivity of partners to sexist attitudes, or to investigate negative comments to ascertain whether they were the product of such attitudes. *Id.* at 1119. The trial judge acknowledged that it was impossible to measure the precise role sexual stereotyping had played in the Policy Board's decision to deny Hopkins partnership, but found that the decision was in fact tainted by discriminatory evaluations that resulted from the firm's failure to root evident sexism from its evaluation system. Accordingly, the District Court determined that Price Waterhouse bore the burden of demonstrating by clear and convincing evidence that its decision would have been the same regardless of such discrimination—a showing the firm was unable to make.

Having concluded that Hopkins was a victim of sexual discrimination, the trial judge went on to find that she was nevertheless not entitled to an order directing the firm to make her a partner. Applying the doctrine of constructive discharge to the professional partnership setting, the District Court determined that Hopkins' departure from Price Waterhouse was the result of neither intolerable working conditions nor any aggravating cir-

into account the fact that female partners presently at Price Waterhouse were selected over a long span of years during which the pool of qualified women changed dramatically. *Hopkins v. Price Waterhouse*, 61 F. Supp. 1109, 1116 (D.D.C. 1985).



cumstances such as a firm history of discrimination or undue humiliation. *Id.* at 1121. Although one OGS partner suggested to plaintiff that she resign, the firm offered to retain her as a senior manager and several partners encouraged her to accept this option. Aside from her failed partnership bid, Hopkins had enjoyed an amicable and otherwise quite successful five years of employment with the firm. The trial court concluded that a discriminatory denial of partnership, without more, did not amount to a showing of constructive discharge and thus did not warrant the equitable relief Hopkins sought. Accordingly, the court denied her both backpay from the date of her resignation and a decree requiring that she be invited to join Price Waterhouse as a partner. The District Court also ruled that although plaintiff had demonstrated her entitlement to an award of backpay compensating her at the partnership salary for the period between her partnership denial and her resignation, she had failed to offer any evidence as to the amount of compensation she should receive. The trial judge acknowledged that this failure was due solely to a stipulation the parties filed in which they agreed to defer resolution of the backpay issue until after the court rendered its liability determination; because that stipulation was filed without the court's knowledge or approval, however, he deemed the issue closed and refused to accept any post-trial evidence on the question. The court therefore awarded Hopkins judgment in the amount of her attorneys' fees only.

The respective cross-appeals followed.

## II.

### A. *The Liability Determination*

Price Waterhouse mounts two attacks on the District Court's determination that it discriminated against Hopkins in violation of Title VII. First, the firm contends

that there is no competent evidence supporting the lower court's finding that impermissible sexual stereotyping infected the partnership evaluation system. Second, Price Waterhouse argues that even if this finding is upheld, the liability determination still cannot stand because the lower court expressly found that Hopkins' behavior provided "ample justification" for the complaints about her lack of interpersonal skills, and that these complaints in turn constituted a legitimate, nondiscriminatory business reason for placing Hopkins' candidacy on hold. Thus, the firm submits that even if the evaluation process has not been purged of sexist attitudes, those attitudes were not responsible for the decision to hold Hopkins for further consideration, and therefore Hopkins has failed to establish any causation between the partnership's inappropriate treatment of female candidates and her own unsuccessful candidacy.

### 1. *The District Court's Findings*

As this court recently emphasized, appellate review of District Court findings in Title VII cases is necessarily narrow. *Underwood v. District of Columbia Armory Board*, 816 F.2d 769, 774 (D.C.Cir.1987). In order to overturn a determination of liability, we must conclude that it is "based on an utterly implausible account of the evidence." *Id.* (quoting *Bishopp v. District of Columbia*, 788 F.2d 781, 786 (D.C.Cir.1986)). Faced with this formidable hurdle, Price Waterhouse eschews any intention of re-arguing its case on appeal: it purports to urge reversal not on the ground that the lower court's view of the evidence is implausible, but on the theory that there simply is no evidence supporting the District Court's finding of discrimination. Notwithstanding its disclaimer, however, defendant's attempt to demonstrate the absence of competent evidence proves, upon closer inspection, to be nothing more than a thinly disguised quarrel with the District Court over appropriate inferences to be drawn from the evidence before it. Given



our narrow scope of review, and the reasonableness of the District Court's findings, we must reject that attempt.

In concluding that Price Waterhouse's partnership evaluation system was infected by impermissible, sexually stereotyped attitudes toward women, the District Court relied on three principal pieces of evidence: (1) the comments partners made about Hopkins herself; (2) the testimony of Dr. Susan Fiske, a social psychologist and an expert in the field of stereotyping, who identified some of these comments as the product of sexual stereotyping; and (3) comments made about other women candidates in previous years. Defendant attempts to dismiss this evidence by isolating various comments and arguing that they are either irrelevant, sex-neutral, or otherwise not probative of discrimination. This piecemeal attack on the District Court's finding, however, ignores the fact that we must view the evidence in its entirety, and is in any event unequal to the task of demonstrating that the court's finding is clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985).

Price Waterhouse argues, for example, that the District Court could not have drawn any adverse inferences about the firm's evaluation system from statements describing Hopkins as "macho," "a somewhat masculine hard-nosed mgr.," or a manager who "overcompensated for being a woman," because all these comments were made by those favoring her candidacy. That Hopkins' supporters made these statements, however, in no way undermines the District Court's finding that they reflect stereotypical thinking on the part of the commenters. Stereotypical attitudes that sometimes work to the advantage of women, such as the once unchallenged assumption that mothers are inherently superior parents and thus nearly always entitled to custody of children in divorce actions, are no less the product of archaic thinking than those attitudes that disadvantage women. The comments of Hopkins'

supporters may or may not have harmed her candidacy,<sup>3</sup> but they are most certainly competent evidence that sexist attitudes were present in the partnership selection process. Price Waterhouse also suggests that one partner's comment that Hopkins needed to take a "course at charm school" is not sex-indicative, because charm is a quality admired both in men and women. This argument borders on the facetious. Charm is indeed an attribute prized in men and women alike, but charm schools are and always have been exclusively female institutions.<sup>4</sup> The sexist import of the comment is patently clear, particularly as charm schools are inextricably linked, both historically and philosophically, with the antiquated notion that women should devote their energies to social and cultural affairs rather than business or professional endeavors. See note 4 *supra*.

Perhaps most telling is Price Waterhouse's desperate attempt to erase from the record Thomas Beyer's advice

<sup>3</sup> We do not share Price Waterhouse's emphatic conviction that because the comments in question were made by her supporters, they could not possibly have hurt Hopkins' partnership prospects. Characterizing a female candidate as "macho" and "masculine" is certainly one way of qualifying, and thereby diluting, an endorsement. Supporters of a male candidate are very unlikely to describe that candidate in sexual terms, *i.e.*, as "masculine," or to excuse character flaws as merely the result of "overcompensating for being a man." Indeed, plaintiff's expert, Dr. Fiske, testified that these qualifying statements reflected a conscious effort on the part of the commenters to overcome their stereotypical attitudes and vote for Hopkins despite their disdain for her behavior. Tr. 565. By couching their qualifications in terms of sexual stereotypes, however, these supporters echoed the complaints of Hopkins' critics, thereby lending credence to those complaints and unwittingly undermining the support they sought to provide.

<sup>4</sup> "Charm school" is a somewhat derogatory colloquialism for an institution formally known as a "finishing school." Webster's defines the latter as "a private school that prepares young women for social life (by emphasizing cultural accomplishments and social graces) rather than for a vocational or professional career." Webster's Third International New Dictionary (1968).

to Hopkins that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 618 F.Supp. at 1117. The firm argues that the District Court erred in stating that Beyer was "responsible for telling her what problems the Policy Board had identified with her candidacy." *Id.* Price Waterhouse claims that this task officially fell to the firm's Senior Partner, Joseph Connor, who made no reference to Hopkins' femininity in his meeting with her following the Policy Board's decision to hold her candidacy. This contention not only rests on the artificial assumption that Beyer, the chief partner in Price Waterhouse's Washington office and Hopkins' leading supporter, would be kept completely in the dark as to the Policy Board's views on her candidacy, but is directly contradicted by the testimony of Roger Marcellin, a member of both the Policy Board and the Admissions Committee at the time of Hopkins' nomination, who stated that he had "no doubt that Tom Beyer would be the one that would have to talk with her [Hopkins]. He knew exactly where the problems were." Tr. 316. Beyer's advice, of course, speaks for itself. That he ardently supported her candidacy and had every motive to give her what he hoped would be helpful counsel simply underscores the genuineness of his belief that Hopkins' failure to behave in a manner apparently expected of a woman by Price Waterhouse partners had damaged her partnership bid.

The District Court also rested its finding of discriminatory sexual stereotyping on the testimony of Dr. Fiske, an expert in the field of stereotyping, who stated that the disappointed stereotypical expectations of male partners played a "major determining role" in the firm's decision not to make Hopkins a partner. Tr. 545. Disclaiming any intention of denigrating Dr. Fiske's field of expertise, Price Waterhouse attempts to dismiss this evidence as "sheer speculation" of "no evidentiary value." Brief for

Appellee-Cross Appellant at 31. This is so, the firm contends, because Dr. Fiske failed to compare the stereotypical comments made about Hopkins with similar comments made about male candidates; she lacked information concerning the authors of these comments; and she had never met Hopkins and had no idea what her conduct or behavior was like. However useful Price Waterhouse might believe this information to be, Dr. Fiske made clear that experts in her field do not require such data in order to determine whether stereotyping is occurring in a given employment context. Dr. Fiske testified that she was an expert at evaluating written comments, that reliance on such written documents was a standard practice in her field, and that she did not need to observe Hopkins or meet her critics because she had the entire universe of reactions to Hopkins before her, as well as comments the same partners made about male candidates. Tr. 595-96. This information, along with other "convergent indicators" or stereotyping—such as the extremely small number of female partners at the firm; the absence of any other female candidates among the 88 nominated along with Hopkins; the exaggerated and extremely intense negative reactions of Hopkins' critics to behavior that supporters perceived as positive; the ambiguous criteria the firm used to evaluate a candidate's personal qualities; the absence of complaints from Hopkins' clients; and the positive assessments of Hopkins in areas where performance could be measured objectively, (*e.g.*, business generation)—taken together provided Dr. Fiske a sufficient basis from which to draw her conclusions that Hopkins was the victim of stereotyping. To the extent that Price Waterhouse believes Dr. Fiske lacked necessary information, the firm is in fact quarreling with her field of expertise and the methodology it employs. Defendant, however, failed to challenge the validity of Dr. Fiske's discipline at trial and disavows any such challenge here. We cannot find any error in the District Court's decision to credit Dr. Fiske's testimony as that of an expert, or



the decision to rely on that testimony as evidence of sexual stereotyping at Price Waterhouse.

Finally, the firm challenges the District Court's reliance on comments partners made about other female candidates, contending that the trial judge intentionally misconstrued these statements in order to find in them evidence of stereotypical thinking. One partner stated that he could never vote for a female partner. One successful female candidate was criticized for being a "women's libber," and two other unsuccessful women were characterized as curt, brusque, and abrasive; "Ma Barker"; and "one of the boys." 618 F.Supp. at 1117. It is of course impossible to misconstrue the sentiment behind a categorical opposition to all female partnership candidates. Despite the fact that the firm took no steps to admonish this partner for his statement, which he made just one year before Hopkins came up for consideration, Price Waterhouse suggests the comment is essentially irrelevant because it was obviously ignored by the Policy Board and was "of no further concern . . . by the time that plaintiff was proposed." Brief for Appellee-Cross Appellant at 37. The firm also argues that the comment about one candidate being a "women's libber" cannot be viewed as evidence of discrimination because the woman in question became a partner; Price Waterhouse similarly attempts to dismiss the references describing one woman as "Ma Barker" and "one of the boys" as comments utterly devoid of stereotypical attitudes, reflecting nothing more than the author's view that this particular woman was a "hick" who socialized too often with non-professional staff. These arguments miss the mark. The District Court did not purport to find that any of these comments determined the fate of the women in question, reflected the views of the Policy Board itself, or had a direct impact on plaintiff's candidacy. Rather, the court relied on them as evidence that partners at Price Waterhouse often evaluated female candidates in terms of their

sex. We find nothing erroneous in such reliance; on the contrary, we believe it is eminently correct.

In sum, there is ample support in the record for the District Court's finding that the partnership selection process at Price Waterhouse was impermissibly infected by stereotypical attitudes towards female candidates.

## 2. *The District Court's Legal Theory*

Price Waterhouse also challenges the liability determination below on two purely legal grounds. First, it contends that Hopkins did not prove "intentional" discrimination on the part of the Policy Board, but only "unconscious" sexual stereotyping by unidentified partners who participated in the selection process. Second, the firm argues that even if such a showing is sufficient to satisfy Title VII's intent requirement, Hopkins did not prove, and the District Court did not find, that this unconscious stereotyping, or the firm's conscious failure to prevent it, actually caused her partnership denial.

Hopkins claimed, and the District Court found, that Price Waterhouse treated her differently than the 87 male candidates nominated in 1982 by subjecting her candidacy to an evaluation system that the firm knew or should have known allowed sexual stereotypes to influence decisions on partnership selection. She made a substantial showing of the role such sexual stereotypes played in the selection system generally and in her own candidacy in particular—a showing made all the more remarkable by the educational background and sophistication of the participants in that system. Price Waterhouse tries to escape liability for this sex-based disparate treatment by arguing that it was not "intentional"—the individual partners who evaluated plaintiff on the basis of stereotypes did so unconsciously, and plaintiff failed to show the extent to which this stereotyping influenced the ultimate decision-maker in this case, the Policy Board. In so arguing, defendant seeks refuge in the collegial nature of its decision-



making body, in the subtle and insidious nature of the discrimination involved, and in a mistaken notion of the intent requirement in disparate treatment cases.

As the Supreme Court noted a decade ago in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), disparate treatment is a type of intentional discrimination whereby an "employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is crucial, although it can in some situations be inferred from the mere fact of differences in treatment." *Id.* at 335-36 n. 15, 97 S.Ct. at 1854 n. 15 (emphasis added). Title VII is, of course, remedial rather than punitive in nature. It is designed to remove "'artificial, arbitrary and unnecessary barriers to employment where those barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.'" *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668 (1973) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971)). In keeping with this purpose, the Supreme Court has never applied the concept of intent so as to excuse an artificial, gender-based employment barrier simply because the employer involved did not harbor the requisite degree of ill-will towards the person in question. As the evidentiary framework established in *McDonnell Douglas* makes clear, the requirements of discriminatory motive in disparate treatment cases does not function as a "state of mind" element, but as a method of ensuring that only those arbitrary or artificial employment barriers that are related to an employee or applicant's race, sex, religion, or national origin are eliminated.<sup>5</sup> Nor is this surprising, as unwitting or

<sup>5</sup> In *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Supreme Court noted that an employer's erroneous assessment of a protected applicant's

ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination.<sup>6</sup> Hopkins demonstrated, and the District Court found, that she was treated less favorably than male candidates because of her sex. This is sufficient to establish discriminatory motive; the fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it. See *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1343 n. 5 (9th Cir.1981) ("when plaintiffs establish that decisions regarding . . . employment are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such attitudes, however subtly, courts are obligated to afford the relief provided by Title VII"), *cert. denied*, 459 U.S. 823, 103 S.Ct. 53, 74 L.Ed.2d 59 (1982).

Price Waterhouse nevertheless argues that Hopkins has failed to establish a discriminatory motive on the part of the actual decisionmaker in this case, the Policy Board, because she has not demonstrated the exact impact that stereotyped comments had on the Board's ultimate decision. The faulty logic upon which this contention is

qualifications does not, by itself, subject the employer to Title VII liability. Such an assessment is of course an arbitrary employment barrier, but it is not based on the applicant's race, sex, religion, or national origin and is thus not within the scope of the statute. *Id.* at 259, 101 S.Ct. at 1096.

<sup>6</sup> In *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823, 103 S.Ct. 53, 74 L.Ed.2d 59 (1982), the Ninth Circuit observed that it was once accepted wisdom that women were unfit to vote, practice law, or undertake professional careers. These beliefs were no less pernicious merely because those subscribing to them may not have suspected their own discriminatory attitudes. Today "[o]ther concepts reflect a discriminatory attitude more subtly; the subtlety does not, however, make the impact less significant or less unlawful. It serves only to make the courts' task of scrutinizing attitudes and motivation, in order to determine the true reason for employment decisions, more exacting." *Id.* at 1343 n.5.

premised, however, would, if accepted, place an enormous, perhaps insurmountable, burden on Title VII litigants who challenge the employment decisions of collegial bodies such as partnerships. It is the rare case indeed in which a group of sophisticated professionals such as the Policy Board would formally pass on the candidacy of a woman or other member of a protected group in the unvarnished terms of the Price Waterhouse partner who objected to all female candidates as a matter of principle. Here, Hopkins presented evidence that stereotypical attitudes towards women had manifested themselves in connection with the partnership bids of other women and, more importantly, that these stereotypes had been brought to bear on her own candidacy. In addition, she offered the expert testimony of Dr. Fiske, who concluded that these attitudes played a "major" role in plaintiff's failure to make partner. In particular, Dr. Fiske noted that these stereotypical attitudes accounted for the extremely negative reactions of Hopkins' critics to behavior that other partners praised in her—negative reactions, moreover, which the Policy Board formally recognized in its recommendation by stating that plaintiff needed to learn social grace. The District Court therefore had ample support for its conclusion that stereotyping played a significant role in blocking plaintiff's admission to the partnership.

In *Burdine*, of course, the Court made clear that ultimately the plaintiff bears the burden of persuasion on the issue of intentional discrimination. While the Court noted that this burden requires the plaintiff to prove that "a discriminatory reason more likely motivated the employer," 450 U.S. at 256, 101 S.Ct. at 1095, it has never ruled definitively that the plaintiff must establish that impermissible discrimination was the predominant or "but for" motivating factor,<sup>7</sup> and the circuits have divided on

<sup>7</sup> In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), the Court stated in a footnote that, for purposes of proving pretext, a Title VII plaintiff need

the question.<sup>8</sup> *McDonnell Douglas* and *Burdine* set out the

not prove that race was the "sole" basis of the adverse employment action, adding that "no more is required to be shown than that race was a 'but for' cause." *Id.* at 282 n.10. Significantly, "[t]he 'no more need be shown' phrase indicates that a showing of but for causation would be sufficient; it does not signify that such a showing is necessary to prevail." *Lewis v. University of Pittsburgh*, 725 F.2d 910, 921 (3d Cir. 1983) (Adams, J., dissenting), *cert. denied*, 469 U.S. 892, 105 S.Ct. 266, 83 L.Ed.2d 202 (1984) (emphasis in original). Neither the majority of circuit courts nor the commentators that have addressed the question have viewed the *McDonald* footnote as definitive. See note 8 *infra* and Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 Col.L.Rev. 292, 302 (1982).

More recently, the Court ruled in an analogous setting that for purposes of establishing an unfair labor practice under the National Labor Relations Act, a showing that antiunion bias was a substantial or motivating factor in an adverse employment decision is sufficient to shift to the employer the burden of proving that the decision would have been the same even absent such bias. *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983). The Court noted that in such mixed-motive cases, "[i]t is fair that [the] employer bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." *Id.* at 403, 103 S.Ct. at 2475.

<sup>8</sup> Only two circuits have adopted the "but for" test of causation. See *Lewis v. University of Pittsburgh*, 725 F.2d 910, 915-17 (3d Cir. 1983) and *Mack v. Cape Elizabeth School Bd.*, 553 F.2d 720, 722 (1st Cir. 1977). Four others have adopted a "substantial factor" test under which race or sex need not be the determinative factor, as long as it had a substantial impact on the decision in question. See *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985) (plaintiff must show employer's decision "more likely than not" motivated by impermissible criterion); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875 n. 9 (11th Cir. 1985) (plaintiff must show discriminatory motive was "significant or substantial factor" in employment decision); *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1166 (9th Cir. 1984) (liability may be imposed on finding that sex was a "significant factor"); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980) (discrimination must be a "significant factor"). The Eighth Circuit has



analytical framework necessary to establish intentional discrimination when there is no direct evidence of such discrimination and, consistent with this analysis, it is inappropriate to require the defendant, simply on the basis of the inference of discrimination raised by plaintiff's prima facie case, to prove that discrimination was not the but for cause of the challenged employment decision. See *Toney v. Block*, 705 F.2d 1364, 1367-68 (D.C. Cir.1983). Here, however, Hopkins has offered direct evidence that her gender was a significant motivating factor in her failure to make partner, and Price Waterhouse's claim that it had other legitimate reasons for its decision in no way negates her showing. At this point, the utility of the *McDonnell Douglas-Burdine* analysis is at an end, for the question is no longer whether plaintiff was "treat[ed] . . . less favorably than others because of . . . [her] sex," *Teamsters*, 431 U.S. at 335-36 n. 15, 97 S.Ct. at 1854 n. 15, but rather whether that less favorable treatment in fact caused the adverse decision she challenges.

Recognizing that "[d]iscriminatory intent is simply not amenable to calibration," *Personnel Administrator v. Feeney*, 442 U.S. 256, 277, 99 S.Ct. 2282, 2295, 60 L.Ed. 2d 870 (1979), courts have struggled to resolve the difficult questions of causation that arise in mixed-motive cases such as this. While most circuits have not confronted the question squarely, the consensus among those that have is that once a Title VII plaintiff has demonstrated by direct evidence that discriminatory animus played a significant or substantial role in the contested employment decision, the burden shifts to the employer

adopted an even less stringent standard that permits a plaintiff to establish Title VII liability simply by showing that an unlawful motive "played some part in the employment decision." *Bibbs v. Block*, 778 F.2d 1318, 1323 (8th Cir. 1985) (en banc) (emphasis added). This circuit has not yet resolved the question. See *American Federation of Government Employees v. FLRA*, 716 F.2d 47, 51 n.2 (D.C. Cir. 1983).

to show that the decision would have been the same absent discrimination. *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 712 (6th Cir.1985) (where plaintiff shows by preponderance of evidence that decision more likely than not motivated by impermissible criterion, burden shifts to employer to show decision would have been the same); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875 n. 9 (11th Cir. 1985) (if plaintiff offers direct evidence that discrimination was substantial factor in decision, burden shifts to employer to show decision would have been the same absent discrimination); see also *Bibbs v. Block*, 778 F.2d 1318, 1323-24 (8th Cir.1985) (en banc) (once plaintiff shows unlawful motive played some part in decision, liability is established; defendant may limit relief by showing decision would have been the same absent discrimination); *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1166 (9th Cir.1984) (where plaintiff shows unlawful motive was a significant factor, liability is established; defendant may limit relief by demonstrating decision would have been the same absent discrimination). But see *Lewis v. University of Pittsburgh*, 725 F.2d 910, 915-16 (3d Cir.1983) (plaintiff must show discriminatory animus was the but for cause of decision), *cert. denied*, 469 U.S. 892, 105 S.Ct. 266, 83 L.Ed.2d 202 (1984). We believe that where a Title VII plaintiff has already discharged her burden of demonstrating that the employment decision was based on impermissible bias,

it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in [her] favor. We chose instead to place the burden upon the employer to show, by "clear and convincing evidence," that the unlawful factor was *not* the determinative one.



*Toney v. Block*, 705 F.2d at 1366 (emphasis in original).<sup>9</sup> This, of course, is precisely the rule the District Court applied below. We believe this burden-shifting mechanism is appropriately invoked in a mixed-motive case such as this, and accordingly we find no error in the District Court's allocation of burdens.

Finally, Price Waterhouse argues that the District Court's findings conclusively demonstrate that Hopkins' unappealing personality, rather than any unlawful discrimination on the part of the Policy Board, was the but for cause of her failure to make partner. The trial judge expressly noted that the concerns raised over Hopkins' dealings with staff found support in the record and "provided ample justification for the complaints that form the basis of the Policy Board's decision." 618 F.Supp. at 1114. Moreover, the judge acknowledged that because of Hopkins' apparent lack of interpersonal skills, "the Court cannot say that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations." *Id.* at 1120. Contrary to Price Waterhouse's contentions, however, these statements are not inconsistent with the court's liability determina-

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<sup>9</sup> In *Toney*, the court declined to apply this test, originally set out in *Day v. Mathews*, 530 F.2d 1083 (D.C. Cir. 1976), to an individual claim of disparate treatment. The court noted that the *Day v. Mathews* test was typically applied in disparate impact class actions in which the class plaintiffs prevailed simply by showing generalized discrimination in the employment unit, without demonstrating that each individual class member had actually suffered directly from that discrimination. In *Toney*, the plaintiff, in accordance with *Burdine*, had relied on circumstantial evidence of discrimination "in the air" to prove his prima facie case. As we noted above, in such circumstances it is inappropriate to shift to the employer the burden of proving that discrimination was not the determinative cause of the adverse decision. Here, however, Hopkins has shown by direct evidence not just "background noise" of discrimination, but that "unlawful discrimination had been applied against [her] in the particular employment decision [at issue]." *Toney*, 705 F.2d at 1366 (emphasis in original). As we explain above, this crucial finding justifies the burden-shifting rule we apply in this case.

tion. On the contrary, they are perfectly in keeping with the fact that this is a case of mixed-motivation. The District Court simply found that both plaintiff's personality and the sexually stereotyped reactions to her personality were significant factors in the firm's decision to hold her candidacy. Because Price Waterhouse could not demonstrate by clear and convincing evidence that impermissible bias was not the determinative factor, however, the District Court properly found for Hopkins on the question of liability.

### B. Relief

Turning to the question of relief, the District Court found that Hopkins was entitled to recover backpay from the date of her partnership denial until the date of her resignation, but disallowed any such recovery because the parties had attempted to bifurcate the trial and postpone consideration of the issue of damages without the knowledge or consent of the court. With respect to post-designation damages, the District Court found that Hopkins had failed to demonstrate that she had been constructively discharged and therefore was ineligible both for backpay subsequent to the date of her resignation and an order directing that she be made a partner.

The facts Hopkins proffered in support of her constructive discharge claim are undisputed. She made clear both at trial and during the course of her employment with Price Waterhouse that consideration for partnership was an absolute prerequisite for any job she would take. Indeed, she left Touche Ross when her husband's successful partnership bid eliminated her own chances for partnership, and she threatened to resign in 1981 when Price Waterhouse suggested that her husband's status as a Touche Ross partner might preclude her consideration for partnership at the firm. Nor does defendant take issue in any way with the District Court's finding that following her initial failure to make partner and OGS's decision

not to re-propose her, it was "very unlikely" that Hopkins would ever become a partner at Price Waterhouse. It is true that plaintiff could have stayed on at the firm as a senior manager and that at least one partner urged her to do so. On the other hand, the customary and nearly unanimous practice at Price Waterhouse, as at most other accounting firms, is for senior managers who have been passed over for partnership to resign, and one of the OGS partners who strongly opposed Hopkins' candidacy advised her to do just that.

In ruling that this showing did not suffice to make out a claim of constructive discharge, the District Court relied on *Clark v. Marsh*, 665 F.2d 1168 (D.C.Cir.1981), where this court stated that in order to prevail on such a claim, an employee must establish that the employer "deliberately made . . . working conditions intolerable and drove [the employee] into 'an involuntary quit.'" *Id.* at 1176 (quoting *Retail Store Employees Union Local 880 v. National Labor Relations Board*, 419 F.2d 329, 332 (D.C.Cir.1969)). We agree that taken at face value, this language sets forth a stringent standard. We believe that the District Court's literal interpretation of that language was misplaced, however, in view of the underlying facts in *Clark*, as well as decisions in cases following it. To begin with, a number of cases, including one relied upon by this court in *Clark*, have rejected the notion that the employer must have the specific intent of forcing the employee to quit. See, e.g., *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir.1984); *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir.1982); *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 66 (5th Cir.1980). These courts have instead held that it is sufficient if the employer simply tolerates discriminatory working conditions that would drive a reasonable person to resign. In addition, *Clark* and cases subsequent to it reveal that the intolerableness of working conditions is very much a function of the reasonable expectations of the employee, including expectations of

promotion or advancement. Thus, in *Clark*, the court noted that the plaintiff, like Hopkins here, "reasonably expected . . . opportunities for advancement" and that the employer's actions "essentially locked [her] into a position from which she could apparently obtain no relief." 665 F.2d at 1174. Similarly, in *Parrett v. City of Connersville Indiana*, 737 F.2d 690 (7th Cir.1984), *cert. denied*, 469 U.S. 1145, 105 S.Ct. 828, 83 L.Ed.2d 820 (1985), the Seventh Circuit found that plaintiff's transfer, without loss of pay, from chief of detectives to line captain, a dead-end position requiring plaintiff to do virtually nothing, was a form of enforced idleness both humiliating and detrimental to a person with the career goals and ambition of the plaintiff. And in *Goss*, the Third Circuit upheld a district court's finding that an employer's discriminatory transfer of plaintiff to a less lucrative sales territory, combined with its indifferent response to her protests of that action, so debilitated and humiliated her that it amounted to a constructive discharge. 747 F.2d 885. In each of these cases there were, of course, other indicia of discriminatory animus, but that is equally true here, where Hopkins faced the prospect of working with a number of partners, including two in her own office, who considered her brusque, abrasive, masculine, and overly aggressive.

We continue to adhere to the view, first set forth in *Clark*, that the mere fact of discrimination, without more, is insufficient to make out a claim of constructive discharge. Similarly, we believe that discrimination is still best attacked within the context of existing employment relations. Price Waterhouse's decision to deny Hopkins partnership status, however, coupled with the OGS's failure to renominate her, would have been viewed by any reasonable senior manager in her position as a career-ending action. Accordingly, it amounted to a constructive discharge. We believe the District Court erred in ruling otherwise and therefore reverse that portion of its decision and remand the case so that the court may con-



duct further proceedings in order to determine the appropriate relief.

In assessing Hopkins' post-resignation damages, the District Court must of necessity consider much if not all of the evidence plaintiff sought to introduce in connection with her claim for backpay for the period between her partnership denial and her resignation. We believe, therefore, that the District Court, in determining damages on remand, should also compensate Hopkins for this period. In so ruling, we do not wish to condone unauthorized bifurcation of Title VII or any other actions, nor are we confident that we would require such a re-determination were it not for our remand. The District Court itself, however, expressly found that Hopkins was entitled to recover pre-resignation damages, and there is no suggestion in the record that she was in any way responsible for the decision to postpone the presentation of evidence in this issue. We are somewhat troubled by the fact that the District Court's penalty for that decision fell solely on plaintiff and resulted in a complete windfall for Price Waterhouse, whose attorneys joined equally in the unauthorized stipulation. In any event, the discourtesy and inconvenience to the court occasioned by the stipulation is largely moot in light of our remand, and we therefore believe it appropriate for the court to award Hopkins the full relief to which she is entitled.

For all the foregoing reasons, we affirm the District Court's liability determination and reverse and remand the case for the determination of appropriate damages and relief.

WILLIAMS, Circuit Judge, dissenting:

The majority implicitly adopts a novel theory of liability under Title VII, but neither confronts the novelty of the theory nor gives it any intelligible bounds. Further, as it must to reach the result, it bends out of recog-

nition this court's holding in *Toney v. Block*, 705 F.2d 1364 (D.C.Cir.1983). These prodigies are necessary for the outcome because the district court's judgment cannot be sustained under any hitherto accepted notion of Title VII liability.<sup>1</sup>

The theory is one of sexual stereotyping. See, e.g., Majority Opinion ("Maj.") at 465, 468, 469. An analysis grounding Title VII liability in such stereotypes may well be meritorious; but its articulation would require care. No one argues that Congress intended entirely to overturn Justice Douglas's observation that "the two sexes are not fungible." *Ballard v. United States*, 329 U.S. 187, 193, 67 S.Ct. 261, 264, 91 L.Ed. 181 (1946). Dismissal of a male employee because he routinely appeared for work in skirts and dresses would surely reflect a form of sexual stereotyping, but it would not, merely on that account, support Title VII liability. Nor, I suppose, does anyone contend that use of the feminine pronoun "she" to describe a female is a forbidden "evaluat[ion of] female candidates in terms of their sex." Maj. at 468.

The court makes no effort to delineate the theory, to draw a line between permissible and impermissible. There is a good reason not to do so: the record here provided no causal connection between Hopkins's fate and such stereotyping as went on among Price Waterhouse's 662 partners. The evidence of sexual stereotyping<sup>2</sup> is carefully culled from a mass of critical comments on the plaintiff's abrasiveness with no sex link whatever. The district court determined that these comments were well founded in fact, represented standards applied to men and women alike, and were the true basis of the firm's

<sup>1</sup> The majority's treatment of the relief issues, however, seems correct.

<sup>2</sup> The line between legally permissible and legally impermissible stereotyping has yet to be drawn. When I use the term, I refer simply to whatever expressions have been so characterized by the district court or the majority.



decision. 618 F.Supp. at 1114-16. The questionable remarks consist, with one marginal exception, of two types. First, some of Hopkin's supporters used such stereotypes in speaking of her or in voicing their speculations as to the workings of her opponents' minds. Second, other partners had used such terms in other years in speaking of other female candidates. Thus, though some forms of sexual stereotyping can be discriminatory, the instances here, however they may be characterized, were at most "generalized discrimination within the employment unit," *Toney v. Block*, 705 F.2d at 1367, rather than discrimination "in the particular employment decision for which retroactive relief was sought," *id.* at 1366 (emphasis in original).

Under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981), and *Toney*, this can do no more than establish a *prima facie* case of discrimination. In functional terms, it put upon the defendant the burden of showing that its stated reasons were not pretextual. Defendant met that burden. The district court made unchallenged findings that the reasons given were "not fabricated as a pretext for discrimination." 618 F.Supp. at 1114. It also found that Price Waterhouse had "legitimate, nondiscriminatory reasons for distinguishing between the plaintiff and the male partners with whom she compares herself." *Id.* at 1115. This clearly restored the burden to plaintiff to show that she was the victim of unlawful discrimination. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. The district court's findings that Hopkins's "conduct provided ample justification for the complaints [about her unpleasantness] that formed the basis of the Policy Board's decision," 618 F.Supp. at 1114, clearly shows that plaintiff did not meet that burden.

The district court summarized its view of the evidence of discrimination in these terms:

Discriminatory stereotyping of females was permitted to play a part. [1] Comments influenced by sex stereotypes were made by partners; [2] the firm's evaluation process gave substantial weight to these comments; and [3] the partnership failed to address the conspicuous problem of stereotyping in partnership evaluations. [4] While these three factors might have been innocent alone, they combined to produce discrimination in the case of this plaintiff.

618 F.Supp. at 1120. I examine these elements in the same order.

1. *Partner comments influenced by stereotypes.* The bulk of the comments instanced as stereotyped are by Hopkins's supporters. One said that opponents focused on Hopkins' profanity "because its [sic] a lady using foul language," another characterized her as "macho," and another said she had "matured from a tough-talking, somewhat masculine hard-nosed mgr. to an authoritative, formidable, but much more appealing lady partner candidate." *Id.* at 1117. The majority evidently refers to these as "stereotypes . . . brought to bear on [Hopkins's] own candidacy," Maj. at 469, but there is no reason to suppose they harmed it.<sup>3</sup> The psychological speculations of Hopkins's boosters cannot by any stretch be "direct evidence that her gender was a significant motivating factor in her failure to make partner." *Id.* at 470.

As for the "smoking gun" remark by her most ardent supporter, Thomas Beyer ("walk more femininely," etc.), there is no reason to suppose that it represented any more than one partner's speculations. The district court was clearly erroneous in characterizing the statement as having been made by Beyer in fulfillment of his "responsib[ility] for telling her what problems the Policy Board had identified with her candidacy." 618 F.Supp. at 1117.

<sup>3</sup> *Cf.* Maj. at 466 ("The comments of Hopkins' supporters may or may not have harmed her candidacy . . .")

Hopkins's own testimony showed that it was Joseph Connor (Beyer's superior) who bore the responsibility for informing Hopkins of the reasons for the decision and who did so. Tr. at 87-97. Hopkins testified that Connor made no remarks about her sex. *Id.* at 95. After speaking with Connor she sought Beyer's advice, along with that of several other partners. *Id.* at 98. Beyer had been on vacation, and he made no claim whatever to inside information on the discussions of the Policy Board: he and Hopkins "tried to *guess* who some of the [opposing partners] might be." *Id.* at 89 (emphasis added). Neither her account of that conversation nor any part of her testimony contradicts the natural inference that his advice was just that: personal speculation as to possibly winning strategies. *Id.* at 102. Beyer's testimony confirms this interpretation: Connor had said nothing to Beyer suggesting that Hopkins' dress, walk, or any aspect of her personal appearance was a problem, but Beyer believed such a change might help. *Id.* at 168. He never articulated the basis for the belief.

The majority tries to shore up the misconception by imputing to Price Waterhouse an "artificial assumption that Beyer . . . would be kept completely in the dark as to the Policy Board's views on her candidacy." Maj. at 466. No one assumes any such thing. The issue is whether Beyer was summarizing the Policy Board's views or was offering his own helpful suggestions. The evidence of Hopkins and Beyer is clear that it was the latter. The only faint evidence the other way came from Roger Marcellin, a partner in another office who did field work for the Policy Board. Tr. at 305-07. He simply assumed ("ha[d] no doubt") that Beyer would be reporting "where the problems were." *Id.* at 316. Beyer's and Hopkins's testimony on the subject makes clear that Marcellin's guesswork was inaccurate.

In the majority's most dramatic imaginative leap, the stereotyped language of Hopkins's supporters is said,

without a shred of supportive evidence, to have "len[t] credence to [stereotyped complaints of Hopkins's critics] and unwittingly undermin[ed] the support they sought to provide." Maj. at 466 n.3. The creativity of the proposition is underscored by its building in an assumption that stereotyped critiques by Hopkins's opponents exist—an assumption for which the majority identifies no record support.

The only remark by a Hopkins opponent that can be characterized as manifesting sexual stereotyping is the facetious suggestion that she should take a "course at charm school." The smoke from this gun seems to me rather wispy. It was embedded in the following comment:

Contacts with Ann are only casual—several mtgs at OGS and MMGS sessions. However, she is consistently annoying and irritating—believes she knows more than anyone about anything, is not afraid to let the world know it. Suggest a course at charm school before she is considered for admission. I would be embarrassed to introduce her as a ptrn.

Def.Exh.27.

The substance of the remark has nothing to do with sex stereotypes. It fits with the many other characterizations of Hopkins ("too assertive, overly critical of others, impatient with her staff"; it required "diplomacy, patience and guts to work with her"; 618 F.Supp. at 1114) for which, the district court found, plaintiff's "conduct provided ample justification," *id.* The objection, of course, is to the opponent's silly phrase. The reference was doubtless sex-linked, and the majority is not unfair in characterizing it as a "somewhat derogatory colloquialism." Maj. at 466 n. 4. Thus it may be more "sexist" than a comment, such as might be made of a young man, wanting in character, that he ought to be "sent to military school." But to find discrimination by Price Waterhouse based simply on this remark is "utterly implausible." See



*Bishopp v. District of Columbia*, 788 F.2d 781, 786 (D.C. Cir.1986) (discussing criteria for disregarding district courts' findings of fact in Title VII cases).

The district court and the majority take refuge in comments made by Price Waterhouse partners in evaluations of other women in other years. 618 F.Supp. at 1117; Maj. at 467-468. These included one plainly beyond the pale—a remark by a partner that he “could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers.” 618 F.Supp. at 1117. So we know that, at least at some time in the past, there was one male chauvinist pig rampant among the Price Waterhouse partners. But there is no evidence that this troglodyte ever influenced a single other partner. His comment was not repeated after 1981, perhaps because the informal atmosphere in the firm made such remarks unacceptable. In any event, no one claims he played any role in the relevant evaluation.

The other remarks (still relating to other evaluations in other years) are ambiguous. For instance, it had been said of one woman candidate that she acted too much like “one of the boys,” 618 F.Supp. at 1117, but this was apparently a criticism of her for socializing too much with the clerical staff and not enough with the professionals. Def.Exh. 64, tab 22. Even the majority recognizes that these remarks had no “direct impact on plaintiff's candidacy.” Maj. at 468. But it takes them as evidence that partners at Price Waterhouse “often evaluate female candidates in terms of their sex.” *Id.*

In a case where alleged sexual stereotyping had a demonstrable connection to the plaintiff, a careful analysis of such remarks would be in order. Such an analysis would begin with the recognition that not all sex-based phrases are sexist. Our vocabulary is full of such phrases, some of which have gradually detached themselves from any genuine link to sex, or even switched sex.

Thus “doll,” originally a slang phrase for a “conventionally pretty and shapely young woman, . . . whose function is to elevate the status of a male and to inspire general lust,” see NEW DICTIONARY OF AMERICAN SLANG 108 (R. Chapman ed. 1986), has come in some contexts to refer to any “notably decent, pleasant, generous person,” as in “Isn't he a doll?” That is the way language evolves, especially in a lively, spontaneous culture such as ours. Words themselves are metaphors, and it is in their nature to acquire meanings completely detached from original, concrete detail, whether or not sex related. Thus the phrase “BS” clearly relies on no distinction between cows and bulls.

Here, the phrase “one of the boys” was used in a sex-neutral sense: it was used of a woman, and since it evidently referred to her camaraderie with clerical staff at Price Waterhouse, the statistical probability is overwhelmingly that they were predominantly women. The phrase's connotation of easy familiarity (an “ordinary, amiable man . . . without side or lofty dignity; = ORDINARY JOE: *His Eminence was trying to be one of the boys,*” *id.* at 305) easily escapes its masculine origins. The phrase does not manifest sexism, notwithstanding the solemn avowals of the plaintiff, the district court and the majority.

But this case does necessitate a study of just what expressions Congress may have wished to wash from the American tongue. The remark related to another candidate in another year. It plainly was not “direct evidence that [Hopkins's] gender was a significant motivating factor in her failure to make partner.” Maj. at 470.

In discussing sex stereotyping, the district court gave great weight to the testimony of Dr. Susan Fiske, a witness purporting to be an expert in that field. She claimed



to be able to find forbidden stereotyping simply by reading partners' comments—without information about the truth of the matters commented upon. Of course where the remarks themselves carry such a tint (if, for example, a commenter had said, "She's too masculine"), anyone could do so. But (apart from the "charm school" remark) no Hopkins detractor said any such thing. Dr. Fiske's expertise rose to the occasion. Her arts enabled her to detect sex stereotyping based largely on "the intensity of the negative reaction." Tr. at 559. So if an observer characterized someone as "overbearing and arrogant and abrasive and running over people," an expert such as Dr. Fiske could discern—and would, if the subject were a woman—that they stemmed from unconscious stereotypes. Dr. Fiske could do this without meeting the subject of the comment or making any inquiry into a possible factual basis. *Id.* at 569, 595-97. To an expert of Dr. Fiske's qualifications, it seems plain that no woman could be overbearing, arrogant or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes.

2. *The evaluation process gave weight to such comments.* This generalization suffers precisely the defect of the first leg of the tripod of liability: it depends entirely upon comments that could have adversely affected Hopkins. Either they related to other candidacies in other years, or they represented her supporters' views or intuitions about her adversaries. All we have that connects in any potentially adverse way with Hopkins is the "charm school" remark.<sup>4</sup>

<sup>4</sup> If this leg is in any way based on the firm's procedure of giving substantial weight to "no" votes, it is inconsistent with the district court's prior finding that "the firm's practice of giving 'no' votes great weight treated male and female candidates in the same way." 618 F.Supp. at 1116. See *Mitchell v. Baldrige*, 759 F.2d 80, 85 n. 3 (D.C. Cir. 1985).

2. *Neglect of duty to address problem of stereotyping.* Key to the district court's finding of liability was Price Waterhouse's failure to institute special programs for sensitizing partners to sex stereotyping, or otherwise to stamp it out of the evaluation process. 618 F.Supp. at 1120. This breaks new ground, blithely free of any effort to link it to any established legal principles. Nor is the new theory intelligibly defined. What set of facts triggers the duty? If such an omission is to ground liability, perhaps the plaintiff should bear an initial burden of demonstrating that gender stereotyping was more probably than not the cause of the adverse employment decision. The majority, like the district court, fails to clarify this important issue, perhaps because it is so clear that Hopkins failed to make such a showing.

From the facts here, it looks as though the duty to sensitize has a hair trigger. The implications are serious. The more delicate the trigger, the more completely this court has dropped the requirement of intentional discrimination out of the law. As few employers can say with confidence that those who run its hiring and promotion are one hundred percent free of what may later be characterized as forbidden stereotyping, the only safe course will be to institute programs of the sort approved by the district court. The rule turns Title VII from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts.

4. *Innocent alone, the three factors combined to produce discrimination in the case of this plaintiff.* Such alchemy is mysterious. Having found that specific complaints caused the Policy Board's adverse decision and that there was ample justification for the complaints, the district court took up the allegations of stereotyping floating in the Price Waterhouse ether and the remarkable intuitions of Dr. Fiske. 618 F.Supp. at 1117-20. The court began on a cautious note—some negative com-

ments on Hopkins “*might be* attributed to sex stereotyping.” *Id.* at 1118. It next determined that the commenters “*may have been* influenced by a sex bias.” *Id.* It then progressed from “*might*” to “*did*,” but never revealed how it reached the final *ipse dixit*.

The evidence here establishes at most the existence of sexist attitudes. Thus there can be no doubt that this court’s decision in *Toney v. Block* controls. The showing of “generalized discrimination” can at the most establish a *prima facie* case, requiring defendant to meet its burden of showing non-pretextual grounds for its action. The district court properly found those established, restoring the burden to plaintiff.

The majority would eviscerate *Toney* by a clever name change: calling the case one of mixed motive, the majority looks to precedents in related areas where a party acting with one permissible motive and one unlawful one may prevail only by affirmatively proving that it would have acted as it did even if the forbidden motive were absent. I have no quarrel with this principle. See *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393, 403, 103 S.Ct. 2469, 2475, 76 L.Ed.2d 667 (1983); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). But it has no relevance where, as here, discrimination has “*not been specifically attributed to the employment decision of which the plaintiff complains.*” *Toney*, 705 F.2d at 1366. *Toney* does not permit a plaintiff to invoke the “mixed motive” concept whenever (1) he or she has shown only background evidence of some generalized discrimination and (2) defendant has proven that a non-pretextual reason “formed the basis” of the act. If this court is to deep-six *Toney*, it should do so *en banc*.

There is not enough evidence of intentional discrimination to support a verdict for Hopkins under any established approach to Title VII liability. The stereotype

theory adopted by the district court should not be allowed to spring to life in a case where its occurrence is not plausibly related to the decision on plaintiff. If a court is to develop such a theory, it should do so in a context where it and the parties properly focus on what elements of sexual differentiation Congress may have sought to stamp out. If failure to provide sensitivity training is to be a ground of Title VII liability, there should be some illumination of the circumstances triggering the duty. And if *Toney* is to be overturned, it should not be by a panel of this court. I dissent.

## APPENDIX B

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

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 Civ. A. No. 84-3040

 ANN B. HOPKINS,  
*Plaintiff,*

v.

 PRICE WATERHOUSE,  
*Defendant.*


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Sept. 20, 1985

## MEMORANDUM

GESELL, District Judge.

Plaintiff was proposed for partnership in Price Waterhouse, a nationwide professional partnership, but was held for further consideration at the next annual partnership selection. The following year the partners in the unit where she worked decided not to propose her a second time. Plaintiff then resigned and filed this suit alleging sex discrimination in violation of Title VII. 42 U.S.C. § 2000e-2. The Court is asked to order that she be made a partner and to award back pay and other monetary relief. A bench trial lasting four and one-half days followed extensive discovery. After receiving proposed findings of fact, further briefs, and hearing full argument, the Court reaches the following findings of fact and conclusions of law.

## Background

Price Waterhouse is a partnership that specializes in providing auditing, tax and management consulting services primarily to private corporations and government agencies. At the time this action was filed, Price Waterhouse had 662 partners operating in 90 offices scattered across the nation. Its partners are certified public accountants and other specialists.

Despite its size and geographic dispersal, Price Waterhouse has consistently sought to maintain the traditional characteristics of a professional partnership both in its management and partnership selection practices. Partners manage the firm through a Senior Partner and Policy Board elected by all the partners. New partners are regularly selected from the ranks of the partnership's senior managers through an elaborate recommendation and review process that culminates in a partnership-wide vote in which the successful candidates are approved. There is no limitation on the number of partners who may be selected in any one year.

The admissions process takes place annually and begins when the partners of each local office may propose that one or more senior managers from their office be considered as partnership candidates. Partners in the local offices draft written recommendations based on a detailed consideration of the candidates' qualifications. These proposals are distributed to all of the firm's 662 partners and each partner is invited to submit evaluation forms on any candidate about whom the partner may have information. Partners who have significant and recent contact with the candidate submit "long-form" evaluations and partners who only have a limited basis upon which to evaluate the candidate submit "short form" evaluations. These forms ask the partners to rank the candidates relative to other recent partnership candidates in 48 different categories ranging from practice development and technical expertise to interpersonal skills and partici-



pation in civic activities. The numerical rankings in this exhaustive list of relevant, neutral criteria is supplemented by asking the partners to indicate whether they believe the candidate should be admitted to the partnership, denied partnership or held for further consideration and asking them to provide a short comment explaining their assessment.

The Admissions Committee reviews each candidate's personnel file and members of the Committee make visits to some local offices to interview partners who have commented in order to determine more precisely the basis for their views on the candidates. The Admissions Committee then prepares a summary of the evaluations and other information and makes its recommendations to the Policy Board. If the recommendation is to "hold" a candidate for reconsideration in a later year or a "no" recommendation denying admission, the Committee prepares a short written statement summarizing its reasons.

The Policy Board reviews the recommendations of the Admissions Committee and votes to include a candidate on the partnership ballot, to "hold" the candidate, or to deny partnership. While the Admissions Committee's recommendations focuses primarily on the qualifications of the individual candidate, the Policy Board may occasionally interject business considerations and decide to recommend a candidate because of the firm's need for a particular type of partner or a particular skill. The candidates recommended by the Policy Board are submitted to the entire partnership for election, and candidates who are not included on the ballot are informed of the Board's reasons for rejecting their candidacy. Candidates who have been held may be repropose in later years and the review process begins again. Price Waterhouse made every document generated by this admissions process on candidates proposed for admission in 1982, 1983 and 1984 available to the plaintiff during the course of discovery in this case.

In 1982 the plaintiff was proposed for partnership by her office, the Office of Government Services (OGS), which specializes in designing and implementing consulting and management projects for government agencies. Plaintiff was the only woman among the 88 candidates for partnership that year. All of the partners in OGS at that time were men. Indeed, as of July, 1984 only seven of the 662 partners at Price Waterhouse were women.

Plaintiff had had a successful career as a senior manager in OGS and had played a significant role in developing business for the firm. She played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract with the Department of State. Afterwards, she helped prepare a proposal and manage a project for a computerized system to handle the State Department's real property worldwide and successfully managed the preparation of a competitive proposal for a computer system to track loans of the Farmers' Home Administration. She had no difficulty dealing with clients and her clients appear to have been very pleased with her work. None of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership. The partners in the OGS office fully endorsed her proposal for partnership. She was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked.

The comments submitted to the Admissions Committee, however, indicated that plaintiff had problems with her "interpersonal skills;" specifically, she had trouble in dealing with staff members. Eight of the thirty-two partners who submitted evaluations recommended that she be denied admission, three favored holding her for reconsideration, and eight indicated that they had insufficient basis for an opinion. Supporters and opponents of her candidacy indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with

staff.<sup>1</sup> She sometimes used profanity and appeared to be insensitive to others. These negative comments and the significant number of "no" votes, most of which were by partners filing short forms because of their limited contact with the plaintiff, were determinative in the Admission Committee's decision to recommend "that she should be HELD at least a year to afford time to demonstrate that she has the personal and leadership qualities required of a partner."<sup>2</sup> After a full discussion the Policy Board adopted this recommendation.

After learning that her candidacy had been put on hold plaintiff, at the urging of the Senior Partner, underwent a Quality Control Review in order to improve her chances of making partner the next year. Several partners indicated that they planned to give the plaintiff opportunities to demonstrate her abilities and receive more exposure. However, these partners never followed through on their plans and the favorable results of the Quality Control Review came too late because just four months after the Policy Board's recommendations the partners in OGS decided not to repropose the plaintiff for partnership. By that time, two partners in the OGS office strongly opposed her candidacy. Without strong support within that office, it was felt that her candidacy could not possibly be successful.

After the decision not to repropose, the plaintiff was advised that it was very unlikely that she would be admitted to partnership. Rather than waiting to try again or accepting an offer to remain as a senior manager, she resigned from Price Waterhouse in January, 1984. After pursuing the appropriate administrative remedies she brought this action.

#### Discussion

From the outset Price Waterhouse has conceded that plaintiff was qualified to be considered for partnership

<sup>1</sup> Plf. Ex. 21.

<sup>2</sup> Plf. Ex. No. 19; Tr. 267-68.

and probably would have been admitted but for the complaints about her interpersonal skills. Consequently, there is no dispute that the plaintiff has presented a *prima facie* case under Title VII by showing that she was a qualified partnership candidate, she was rejected, and Price Waterhouse continues to seek partners with her qualifications. See *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 104 S.Ct. 2794, 2799, 81 L.Ed.2d 718 (1984); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 & n. 6, 101 S.Ct. 1089, 1094 & n. 6, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The only dispute between the parties is whether Price Waterhouse's concerns about the plaintiff's interpersonal skills present a legitimate, nondiscriminatory reason to deny partnership or constitute a pretext to disguise sex discrimination.

Plaintiff advanced three arguments for maintaining that the decision was discriminatory: (1) the criticisms of plaintiff's interpersonal skills were fabricated; (2) even if the firm believed her interpersonal skills were deficient, Price Waterhouse has routinely admitted male candidates with interpersonal skills problems if they had strong qualifications in other areas and would have admitted her if she had not been a woman; (3) the criticisms of the plaintiff's interpersonal skills for a product of sexual stereotyping by male partners and the firm's partnership selection process improperly gave full weight to these discriminatory evaluations. Price Waterhouse denies these allegations and claims that plaintiff was properly denied partnership because the firm, for legitimate business reasons, seeks to avoid having abrasive partners who might jeopardize morale and be incapable of successfully supervising staff as they move among different locations in response to work demands. Although plaintiff's arguments are closely interrelated, it is necessary to examine them separately.



1. *Fabrication of Complaints About Interpersonal Skills.*

The interpersonal skills of prospective partners was properly an important part of Price Waterhouse's written partnership evaluation criteria. Inability to get along with staff or peers is a legitimate, nondiscriminatory reason for refusing to admit a candidate to partnership. Cf. *Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 37 Fair Empl.Prac.Cas. (BNA) 1862 (3d Cir.1985); *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 73 (1st Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 433, 83 L.Ed.2d 359 (1984); *Burrus v. United Telephone of Kansas*, 683 F.2d 339, 342-43 (10th Cir.1982), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982).

It is clear that the complaints about the plaintiff's interpersonal skills were not fabricated as a pretext for discrimination. Even the plaintiff admitted that she is a "hard-driving" manager who pushes her staff and occasionally uses profanity.<sup>3</sup> Contemporaneous records of counseling sessions and evaluations conducted well before the plaintiff was proposed for partnership indicate that partners found her too assertive, overly critical of others, impatient with her staff, and counselled her to soften her image.<sup>4</sup> At the time, plaintiff indicated that she agreed with many of these criticisms. Even partners who strongly supported her partnership candidacy acknowledged these deficiencies, although in more muted tones, when emphasizing the high quality of her work and her value to the firm. Staff members who testified on the plaintiff's behalf indicated that she was an effective manager but her hard-driving style might be regarded as "controversial" and it required "diplomacy, patience and guts" to work with her.<sup>5</sup> Plaintiff's conduct provided

<sup>3</sup> Tr. 44, 52.

<sup>4</sup> Def.Ex. No. 10, 11, 12, 13, 14, 17, 24, 25.

<sup>5</sup> Tr. 423, 434.

ample justification for the complaints that formed the basis of the Policy Board's decision.

Plaintiff also alleges that the two OGS partners who blocked reproposing her after the Policy Board held her candidacy for reconsideration falsified their reasons to hide their discriminatory motives. There is not sufficient proof to support this allegation. One partner recommended that she be put on hold when she was first proposed and apparently opposed reproposal because he found her disagreeable to work with and had reservations about her technical skills and dedication to the firm. Although there is some suggestion that this partner may have held a personal grudge against the plaintiff, there is no proof that his position was animated by animosity toward her sex.

The second partner supported the plaintiff when she was first proposed, but changed his position after receiving additional criticism of her management style from staff members, having several conversations with the plaintiff, and reflecting on his previous experience with her work. His decision to oppose the plaintiff's candidacy put him in the uncomfortable position of being in direct conflict with the head partner in the office, who was one of the plaintiff's biggest boosters. Although the plaintiff disputes his version of the events that led him to change his vote, the Court found him to be a credible witness and accepts his account of these events. Plaintiff has failed to satisfy her burden of proving that the explanations given by these two partners were pretextual.

As a result, plaintiff has failed to show that the decision of the OGS partners not to repropose her was discriminatory. While offers from several partners to arrange assignments which might have improved her chances for partnership never materialized and no one made any effort to check on the plaintiff's current relationship with staff members after she was placed on hold, the evidence before the Court indicates that this was due to the timing

of the partnership evaluation process rather than any discriminatory motives. Only a few months separated the announcement that plaintiff had been placed on hold and the vote not to repropose her so the firm had little opportunity to change plaintiff's assignment or do a thorough investigation into her subsequent relationships with staff. The decision not to repropose was due to the unexpected position taken by the two partners discussed above and plaintiff has not proven that their actions were discriminatory.

## 2. *Balancing Interpersonal Skills Against Other Qualifications.*

Plaintiff alleges that even if there were problems with her interpersonal skills she was so highly qualified in every other respect that the firm would have made her a partner if it had not discriminated against her because of her sex. She claims that the Policy Board invariably admits men who have interpersonal skills problems and comparing her "superb" record with that of these men show that she is a victim of classic disparate treatment. Price Waterhouse does not concede that interpersonal skills were the plaintiff's sole deficiency, but it admits that they were the principle and determinative reason for the firm's decision. Nonetheless, Price Waterhouse claims that the male candidates that the plaintiff points to are not comparable and do not indicate disparate treatment.

Fortunately the Court does not have to engage in the difficult task of second-guessing the Policy Board's balancing of professional skills of candidates from different years in order to resolve this allegation. The contemporaneous records generated by the partnership selection procedure demonstrate that Price Waterhouse had legitimate, nondiscriminatory reasons for distinguishing between the plaintiff and the male partners with whom she compares herself.

From past partnership admissions records the plaintiff has identified two male candidates who were criticized for

their interpersonal skills because they were perceived as being aggressive, overbearing, abrasive or crude, but were recommended by the Policy Board and elected partner. Price Waterhouse points out that in both cases the Policy Board expressed substantial reservations about the candidates' interpersonal skills but ultimately made a "business decision" to admit the candidates because they had skills which the firm had a specific, special need and the firm feared that their talents might be lost if they were put on hold. In one case the Policy Board rejected a "hold" recommendation by the Admissions Committee because of business considerations. In addition, these candidates received fewer evaluations from partners recommending that they be denied partnership and the negative comments on these candidates were less intense than those directed at the plaintiff.<sup>6</sup>

The significance of "no" votes and negative comments warrants some further comment. In the course of this trial, Price Waterhouse has been very forthcoming in providing information on its partnership selection process. The evidence as a whole indicates that over the years the firm has consistently placed a high premium on candidates' ability to deal with subordinates and peers on an interpersonal basis and to promote cordial relations within a firm which is necessarily dependent on team effort. Not only are candidates regularly held because of concerns about their interpersonal skills—the Policy Board takes any evaluations recommending denial of partnership or a negative reaction on this basis very seriously. Despite

<sup>6</sup> Def.Ex. Nos. 73, 83, 84; Plf.Ex. No. 20. In post-trial briefing, the plaintiff sought to raise two additional examples. The evidence before the Court on these candidates is fragmentary, at best, consisting of comments taken out of context, statistical summaries of their evaluation forms and brief notes. From this limited evidence it appears that these candidates also evoked fewer and less intense negative comments than the plaintiff. The Court finds that the plaintiff has not provided sufficient proof to demonstrate disparate treatment based on these candidates.



the fact that the negative comments of short form evaluations are often in sharp contrast to the glowing reports of partners who have had extensive contact with the candidate, such comments are treated as serious reservations and given great weight. "No" votes, even from short form commentators who may only have had very limited contact with the candidate, often result in a "no" or "hold" decision.

Thus, while plaintiff argues that her accomplishments in generating business, management and client satisfaction were so far above average that she would have been admitted despite any interpersonal skills problems if Price Waterhouse had honestly balanced all her qualifications, Price Waterhouse responds by pointing out that she received very few "yes" votes and more "no" votes than all but two of the 88 candidates that year. These no votes and negative comments, largely from partners outside OGS, effectively placed the plaintiff toward the bottom of the candidate pool. Regardless of its wisdom, the firm's practice of giving "no" votes great weight treated male and female candidates in the same way. "The issue in a case of alleged failure to hire or promote is not the objective superiority or inferiority of the plaintiff's qualifications, but rather whether the defendant's selection criteria—be they wise or foolish—are *nondiscriminatory*." *Mitchell v. Baldrige*, 759 F.2d 80, 85 n. 3 (D.C.Cir. 1985). The Court finds that the firm's emphasis on negative comments did not, by itself, result in any discriminatory disparate treatment.

Plaintiff tried to reinforce her claim of disparate treatment with a number of statistics that proved wholly inconclusive. Plaintiff attempted to show that the small number of women partners at Price Waterhouse indicates discrimination but her proof lacked sufficient data on the number of qualified women available for partnership and failed to take into account that the present pool of partners have been selected over a long span of years

during which the pool of available qualified women has changed. Women have only recently entered the accounting and related fields in large numbers and there is evidence that many potential women partners were hired away from Price Waterhouse by clients and rival accounting firms.

Although women partnership candidates have been elected to partnership at a slightly lower rate than men (60% versus 68%), the difference is not statistically significant. The other statistical studies presented by plaintiff only bear an indirect relationship to Price Waterhouse's practice in partnership selection, and when corrected to examine the appropriate comparisons, lack statistical significance. No conclusion can be drawn from this fragile data.

### 3. *Stereotyping and the Partnership Selection Process.*

Plaintiff's final argument begins with the allegation that the male partners who criticized her interpersonal skills applied a double standard. She claims that she was not evaluated as a manager, but as a woman manager, based on a sexual stereotype that prompts males to regard assertive behavior in women as being more offensive and intolerable than comparable behavior in men because some men do not regard it as appropriate "feminine" behavior.

Plaintiff claims that this type of sexual stereotyping is reflected in comments about her aggressiveness and profanity that indicate she was being evaluated as a woman and not simply as a partnership candidate. One commentator said "she may have overcompensated for being a woman." Another suggested that she needed to take a "course at charm school." Supporters indicated that her critics judged her harshly due to her sex. One acknowledged "Ann has a clearly different personality," but "[m]any male partners are worse than Ann (language and tough personality)," and people were only focusing on her profanity "because its a lady using foul language."

Another conceded that she initially came across as "macho" but said, "if you get around the personality thing she's at the top of the list or way above average." Another defended her by saying, "she had matured from a tough-talking, somewhat masculine hard-nosed mgr. to an authoritative, formidable, but much more appealing lady partner candidate."<sup>7</sup> When plaintiff consulted with the head partner at OGS, who was her strongest supporter and responsible for telling her what problems the Policy Board had identified with her candidacy, she was advised to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.<sup>8</sup>

Some comments on other women partnership candidates in prior years support the inference that the partnership evaluation process at Price Waterhouse was affected by sexual stereotyping. Candidates were viewed favorably if partners believed they maintained their femininity while becoming effective professional managers. To be identified as a "women's liber" was regarded as negative comment. Nothing was done to discourage sexually biased evaluations. One partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers—yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations. Besides the plaintiff, the Admissions Committee rejected at least two other women candidates because partners believed that they were curt, brusque and abrasive, acted like "Ma Barker" or tried to be "one of the boys." Comments suggesting that sex stereotypes may have influenced the partners' evaluations of interpersonal skills were not

<sup>7</sup> Plf.Ex. No. 21; Def.Ex. No. 30, 31; Tr. 321.

<sup>8</sup> Tr. 102, 316.

frequent, but they appear as part of the regular fodder of the partnership evaluations.<sup>9</sup>

Plaintiff presented a well qualified expert, Dr. Susan Fiske, who has done extensive research and study in the field of stereotyping. Dr. Fiske examined the partners comments about the plaintiff and other partnership candidates and gave opinions as to the possible presence of sex stereotyping. Dr. Fiske did not purport to be able to determine whether or not any particular reaction was determined by the operation of sex stereotypes. However, she did identify comments that she believed were influenced by sex stereotypes. Dr. Fiske stated that in her opinion unfavorable comments by male partners, slanted in a negative direction by operation of male stereotyping, were a major factor in the firm's evaluation of the plaintiff. But she could not pinpoint the degree to which stereotyping had influenced the selection process.

That deep within males and females there exist sexually based reactions to the personal characteristics of one of the opposite sex surely comes as no surprise. It is well documented that men evaluating women in managerial occupations sometimes apply stereotypes which discriminate against women.<sup>10</sup> Indeed, the subtle and unconscious discrimination created by sex stereotyping appears to be a major impediment to Title VII's goal of

<sup>9</sup> Def.Ex. No. 63.

<sup>10</sup> See, e.g., Ruble, Cohen and Ruble, *Sex Stereotypes: Occupational Barriers for Women*, 27 Amer.Behav.Sc. 339 (1984) (surveying literature); R.M. KANTER, *MEN AND WOMEN OF THE CORPORATION* 206-42 (1977) (reporting results of study); Rosen and Jerdee, *Perceived Sex Differences in Managerial Relevant Characteristics*, 4 Sex Roles 837 (1978) (same); Rosen and Jerdee, *Influence of Sex Role Stereotypes on Personnel Decisions*, 59 J.Appl.Psych. 9 (1974) (same); Schein, *The Relationship Between Sex Role Stereotypes and Requisite Management Characteristics*, 57 J.App.Psych. 95 (1973) (same).



ensuring equal employment opportunities.<sup>11</sup> Dr. Fiske testified that situations, like that at Price Waterhouse, in which men evaluate women based on limited contact with the individual in a traditionally male profession and a male working environment foster stereotyping. One common form of stereotyping is that women engaged in assertive behavior are judged more critically because aggressive conduct is viewed as a masculine characteristic.<sup>12</sup>

Establishing a claim of disparate treatment based on subjective evaluations requires proof of discriminatory motive or purpose. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977). The Court finds that while stereotyping played an undefined role in blocking plaintiff's admission to the partnership in this instance, it was unconscious on the part of the partners who submitted comments. The comments of the individual partners and the expert evidence of Dr. Fiske do not prove an intentional discriminatory motive or purpose. A far more subtle process is involved when one who is in a distinct minority may be viewed differently by the majority because the individual deviates from an artificial standardized profile. Even in examining the comments months later at trial, it is impossible to label any particular negative reaction as being motivated by intentional sex stereotyping. Business women who earn a place at the highest ranks of their profession by combining ability with a strong persistent effort to succeed frequently sense antagonism from some male colleagues

<sup>11</sup> See Taub, *Keeping Women in Their Place: Stereotyping Per Se As A Form of Employment Discrimination*, 21 B.C.L.Rev. 345, 349-61 (1980).

<sup>12</sup> See, e.g., Wiley and Eskilson, *Coping in the Corporation, Sex Role Constraints*, 12 J.App.Soc.Psych. 1, 8 (1982); Prather, *Why Can't Women Be More Like Men: A Summary of the Sociopsychological Factors Hindering Women's Advancement in the Professions*, 15 Am.Beh.Sc. 172 (1971).

whose contact with the working female as an equal has been limited. However, considering the infinite variety of work conditions; differences in experience, education and perceptions among individuals in working encounters; as well as the fact that the interactions of personalities of either sex are as complex and inscrutable and as infinite as combinations of genes will produce, it is impossible to accept the view that Congress intended to have courts police every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex.

But plaintiff takes her argument one step further and stresses that the Price Waterhouse partnership evaluation system permitted negative comments tainted by stereotyping to defeat her candidacy, despite clear indications that the evaluations were tainted by discriminatory stereotyping. All the evaluators were men. The Policy Board gave great weight to the negative views of individuals who had very little contact with the plaintiff. Several of the negative comments allude to the plaintiff's sex and many might be attributed to sex stereotyping. Despite the fact that the comments on women candidates often suggested that the male evaluators may have been influenced by a sex bias, the Policy Board never addressed the problem. The firm never took any steps in its partnership policy statement or in the evaluation forms submitted to partners to articulate a policy against discrimination or to discourage sexual bias.<sup>13</sup> The Admissions Committee never attempted to investigate whether any of

<sup>13</sup> Price Waterhouse submitted evidence to show it had promulgated a general policy of equal employment opportunities in employment for all minorities. Def.Ex. Nos. 88, 89. However, the exhibits before the Court only reflect a policy statement issued sometime in 1983. More importantly, the statement is directed generally at staff employment. It is not clear whether it applies to the partnership selection process at all and it does not address any special concerns with discrimination against women in an overwhelmingly male partnership.

the negative comments concerning the plaintiff were based on a discriminatory doubt standard.<sup>14</sup>

Whenever a promotion system relies on highly subjective evaluations of candidates by individuals or panels dominated by members of a different sex, there is ground for concern that such "high level subjectivity subjects the ultimate promotion decision to the intolerable occurrence of conscious or unconscious prejudice." *Robinson v. Union Carbide Corp.*, 538 F.2d 652, 662 (5th Cir.1976), cert. denied, 434 U.S. 822, 98 S.Ct. 65, 54 L.Ed.2d 78 (1977). Such procedures "must be closely scrutinized because of their capacity for masking unlawful bias." *Davis v. Califano*, 613 F.2d 957, 965 (D.C.Cir.1979). This scrutiny comprehends examination of evaluation procedures that permit or give effect to sexual stereotyping. Differential treatment on account of sex, even if it is not obviously based on a characteristic of sex, violates Title VII. *McKinney v. Dole*, 765 F.2d 1129, 1138-39 (D.C.Cir.1985). An employer who treats a woman with an assertive personality in a different manner than if she had been a man is guilty of sex discrimination. See *Craik v. Minnesota State University Board*, 731 F.2d 465, 481-84 (8th Cir. 1984); *Skelton v. Balzano*, 424 F.Supp. 1231, 1235 (D.D.C.1976). A female cannot be excluded from a partnership dominated by males if a sexual bias plays a part in the decision and the employer is aware that such bias played a part in the exclusion decision.

Although the stereotyping by individual partners may have been unconscious on their part, the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole. There is no direct evidence of any determined purpose to maliciously discriminate against women but plaintiff appears to have been a victim of "omissive and subtle" discrimination created by a system that made evaluations based

on "outmoded attitudes" determinative. *Marimont v. Califano*, 464 F.Supp. 1220, 1226 & n. 15 (D.D.C. 1979). As noted above, the firm accorded substantial weight to negative comments and recommendations, even if they came from partners who had limited contact with a candidate. The evidence indicates that Price Waterhouse should have been aware that women being evaluated by male partners might well be victims of discriminatory stereotypes. Yet the firm made no efforts to make partners sensitive to the dangers, to discourage comments tainted by sexism, or to investigate comments to determine whether they were influenced by stereotypes.

The Court is aware that this case involves applying Title VII to a professional partnership. Partnership consideration was clearly a privilege of plaintiff's employment covered by Title VII. *Hishon v. King and Spaulding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). Title VII does not bar a partnership from considering subjective evaluations of interpersonal skills as significant criteria in the partnership selection process. Subjective evaluations in high-level, professional jobs have received particular deference in Title VII cases. See *Zahorik v. Cornell University*, 729 F.2d 85, 93 (2d Cir.1984); *Harris v. Group Health Insurance*, 662 F.2d 869, 873 (D.C. Cir.1981); Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv.L.Rev. 945, 973-78 (1982); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 Wm. & Mary L.Rev. 45, 48-62 (1979). However, while partnerships must be given freedom to evaluate the qualifications of employees who seek to become partners, they are not free to inject stereotyped assumptions about women into the selection process. Neither a partnership nor any other employer can remain indifferent to indications that its evaluation system is subject to sex bias, as Price Waterhouse did in plaintiff's case. Price Waterhouse's failure to take the steps necessary to alert partners to the pos-

<sup>14</sup> Def.Ex. No. 23; Tr. 280-81; Connor Dep. at 103.



sibility that their judgments may be biased, to discourage stereotyping, and to investigate and discard, where appropriate, comments that suggest a double standard constitutes a violation of Title VII in this instance.<sup>15</sup>

Price Waterhouse had every reason and legal right to come down hard on abrasive conduct in men or women seeking partnership. But "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *County of Washington v. Gunther*, 452 U.S. 161, 180, 101 S.Ct. 2242, 2253, 68 L.Ed.2d 751 (1981), quoting *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 707 n. 13, 98 S.Ct. 1370, 1375 n. 13, 55 L.Ed.2d 657 (1978). This is not a case where "standards were shaped only by neutral professional and technical considerations and not by any stereotypical notions of female roles and images." *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 38 Fair Empl.Prac.Cas. (BNA) 404, 412 (8th Cir.1985). Discriminatory stereotyping of females was permitted to play a part. Comments influenced by sex stereotypes were made by partners; the firm's evaluation process gave substantial weight to these comments; and the partnership failed to address the conspicuous problem of stereotyping in partnership evaluations. While these three factors might have been innocent alone, they combined to produce discrimination in the case of this plaintiff. The Court finds that the Policy Board's decision not to admit the plaintiff to partnership was tainted by discriminatory evaluations that were the direct

<sup>15</sup> Common sense is confirmed by the literature on the problem of sex stereotyping which suggests that making evaluators aware of the risk of biased evaluations and inquiring as to whether generalizations are supported by concrete incidents can be effective in eliminating or minimizing stereotyping. See Taub, *supra* note 7, at 3600, 395-97; Wiley and Eskilson, *supra* note 8, at 9.

result of its failure to address the evident problem of sexual stereotyping in partners' evaluations.<sup>16</sup>

### Remedy

Because plaintiff had considerable problems dealing with staff and peers, the Court cannot say that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations. Even supporters of the plaintiff viewed her style as somewhat offensive and detrimental to her effectiveness as a manager. However, once a plaintiff proves that sex discrimination played a role in an employment decision, the plaintiff is entitled to relief unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination. *Williams v. Boorstin*, 663 F.2d 109, 117 (D.C.Cir.1980); *Day v. Mathews*, 530 F.2d 1083, 1085-86 (D.C.Cir.1976). Price Waterhouse has not done so. Where sex discrimination is present, even if a promotion decision is a mixture of legitimate and discriminatory considerations, uncertainties must be resolved against the employer so that the

<sup>16</sup> There is currently a split among the circuits as to whether a subjective evaluation process may be challenged based on disparate impact and disparate treatment theories or may only be challenged on disparate treatment theory. Compare *Pouncy v. Prudential Insurance Company of America*, 668 F.2d 795, 799-801 (5th Cir. 1982) (discriminatory impact model inappropriate for challenging subjective evaluation procedures) with *Griffin v. Carlin*, 755 F.2d 1516, 1522-25 (11th Cir. 1985) (both models may be used to challenge subjective evaluations); *Segar v. Smith*, 738 F.2d 1249, 1288 n. 34 (D.C. Cir. 1984) (disparate impact applied to evaluation process with some subjective elements). We need not become involved in this dispute. Plaintiff cannot show the substantial statistical disparity ordinarily required to show that a subjective evaluation process produces a discriminatory disparate impact. See *Yartzoff v. State of Oregon*, 745 F.2d 557 (9th Cir. 1984). This decision is based on disparate treatment where the employer maintained a subjective evaluation process which, based on the proof presented in the comments on the plaintiff, resulted in plaintiff's evaluation being tainted by a discriminatory bias.

remedial purposes of Title VII will not be thwarted by saddling an individual subject to discrimination with an impossible burden of proof.

However, plaintiff must carry the burden of proof on another issue. She has the burden of proving that she was constructively discharged. If the plaintiff resigned voluntarily, and not because Price Waterhouse made working conditions intolerable and drove her to quit, she is not entitled to an order that she made a partner. *Clark v. Marsh*, 665 F.2d 1168, 1172-73 (D.C.Cir.1981). The fact that discrimination has occurred does not, by itself, provide the "aggravating factors" required to prove a constructive discharge. *Id.* at 173-74. Plaintiff has not shown any history of discrimination, humiliation or other aggravating factors that would have compelled her to resign. She dropped her allegations of harassment and retaliation before trial. Aside from Price Waterhouse's denial of partnership, plaintiff's experience at the firm appears to have been quite normal and amicable. The one incident in which a project managed by the plaintiff was unfavorably evaluated appears to have involved a disagreement over the appropriate technical standards rather than an improper effort to pressure plaintiff to resign. Price Waterhouse offered to retain her as an employee and some partners even encouraged her to take this option rather than resign when it appeared unlikely that she would become a partner.<sup>17</sup> Being denied partnership was undoubtedly a professional disappointment and it may have been professionally advantageous for plaintiff to leave the firm when it was unlikely she would not obtain her ultimate goal. Disappointments do not constitute a constructive discharge, however. See *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 65-66 (5th Cir.1980); *Sparrow v. Piedmont Health Systems Agency, Inc.*, 593 F.Supp. 1107, 1117-18 (M.D.N.C.1984). Recognizing that in partnerships, as in other employment contexts, "society and the policies underlying Title VII will

<sup>17</sup> Tr. 112.

be best served if, wherever possible, unlawful discrimination is attacked within the context of exiting employment relationships." 617 F.2d at 66, plaintiff's failure to show a constructive discharge requires the Court to deny plaintiff's request for an order directing Price Waterhouse to make her a partner.

Because plaintiff has failed to prove a constructive discharge, she is not entitled to any monetary relief for the period subsequent to her resignation. *Clark v. Marsh*, 665 F.2d at 1172. Nevertheless, plaintiff has satisfied her burden of proving discrimination under Title VII and established the predicate for an award of backpay from the date she would have been elected partner, July 1, 1983, until her voluntary resignation on January 17, 1984. Backpay for these few months, limited to the difference between plaintiff's compensation as a senior manager during that period and what her compensation would have been if elected to partnership, might have been appropriate if proof had been presented. However, no evidence has been presented on what compensation plaintiff would have received if she had been elected partner. The parties have represented that, without the knowledge or consent of the Court, they agreed to defer resolving the amount of backpay until the issue of liability was resolved. But the parties do not have the authority to structure a trial for their own convenience. Issues can only be separated for a separate trial by order of the Court. Fed.R.Civ.P. 42(b). No such order was ever requested or granted in this case. A party who makes an "unauthorized determination not to go forward on issues that were properly in the case does so at his own peril." *U.S. Industries Inc. v. Blake Construction Co., Inc.*, 765 F.2d 195, 209-10 (D.C.Cir.1985). Under the circumstances the Court can do no more than recognize plaintiff as the prevailing party on the issue of liability, grant judgment in favor of the plaintiff, and award attorneys fees. No other equitable relief is appropriate on this record.



62a

An appropriate order is entered contemporaneous with the filing of this memorandum.

ORDER

It appearing for reasons set forth in a memorandum filed this day that plaintiff has prevailed on the merits of her claim that denial of partnership in her specific situation was caused, in part, by defendant's failure to protect against the presence of sex discrimination in evaluations of her qualifications for partnership, but that plaintiff has failed to establish any basis for granting equitable relief in the form of backpay or other relief, it is hereby

ORDERED, that the complaint shall be and hereby is dismissed; and it is further

ORDERED, that plaintiff shall be and hereby is awarded her reasonable attorneys fees plus costs to be set by the clerk; and it is further

ORDERED, that the parties shall attempt to agree on an amount to compensate for such reasonable attorney fees and advise the Court in writing on or before September 30, 1985, whether further proceedings to establish the fee award will be necessary.

63a

APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 85-6052

ANN B. HOPKINS,

v.

*Appellant*

PRICE WATERHOUSE

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No. 85-6097

ANN B. HOPKINS

v.

PRICE WATERHOUSE,

*Appellant*

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[Filed Aug. 4, 1987]

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Appeal from the United States District Court  
for the District of Columbia

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Before: EDWARDS and WILLIAMS, Circuit Judges, and  
JOYCE HENS GREEN,\* District Judge.

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\* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

## JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part, and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.

*Per Curiam*

For The Court

/s/ George A. Fisher  
GEORGE A. FISHER  
Clerk

Date: August 4, 1987

Opinion for the Court filed by District Judge Green.

Dissenting opinion filed by Circuit Judge Williams.

## APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6052

ANN B. HOPKINS

v.

PRICE WATERHOUSE

[Filed Sept. 30, 1987]

Before: EDWARDS and WILLIAMS, Circuit Judges;  
JOYCE H. GREEN,\* District Judge, U.S. District Court for the District of Columbia

## ORDER

Upon consideration of the petition for rehearing of appellee/cross-appellant, it is

ORDERED, by the Court, that the petition is denied.

*Per Curiam*

FOR THE COURT:

GEORGE A. FISHER  
Clerk

By: /s/ Robert A. Bonner  
ROBERT A. BONNER  
Deputy Clerk

Circuit Judge Williams would grant the petition for rehearing.

\* Sitting pursuant to 28 U.S.C. 292(a).



APPENDIX E

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 85-6052

ANN B. HOPKINS

v.

PRICE WATERHOUSE

---

[Filed Sept. 30, 1987]

Before: WALD, Chief Judge; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, Circuit Judges

ORDER

The suggestion for rehearing *en banc* of appellee/cross-appellant has been circulated to the full Court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

*Per Curiam*

FOR THE COURT:

GEORGE A. FISHER  
Clerk

By: /s/ Robert A. Bonner  
ROBERT A. BONNER  
Deputy Clerk

Chief Judge Wald and Circuit Judges Starr and D. H. Ginsburg did not participate in this order.

No. 87-1167

Supreme Court

FILED

FEB 11 1988

JOSEPH F. SPANIOLO  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

PRICE WATERHOUSE,  
*Petitioner*

v.

ANN B. HOPKINS,  
*Respondent*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

**BRIEF FOR RESPONDENT  
IN OPPOSITION**

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### QUESTIONS PRESENTED

1. Whether the district court was clearly erroneous in finding that petitioner's rejection of respondent's candidacy for partnership was caused, in part, by discrimination based on sex.

2. Whether, given this finding, the courts below properly placed on petitioner the burden of proving that the same result would have been reached absent discrimination.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

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No. 87-1167

---

PRICE WATERHOUSE,  
*Petitioner*

v.

ANN B. HOPKINS,  
*Respondent*

---

**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit**

---

**BRIEF FOR RESPONDENT  
IN OPPOSITION**

---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 825 F.2d 458. The opinion of the district court (Pet. App. 40a-62a) is reported at 618 F.Supp. 1109.

**JURISDICTION**

The judgment of the court of appeals was entered on August 4, 1987 (Pet. App. 63a), and a petition for rehearing was denied on September 30, 1987 (Pet. App. 65a). On December 11, 1987 the Chief Justice extended



the time for filing the petition for a writ of certiorari to January 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

This case examined the elaborate and unique admissions process of petitioner Price Waterhouse, a large nationwide firm that in 1983 rejected respondent Ann Hopkins' candidacy for partnership. The partnership admissions process occurs annually, stretching over a nine month period, and involves consideration of scores of candidates. Each admissions cycle includes, among other things, discussion and nomination of candidates by partners in a local office, "long form" or "short form" written comments by partners from other offices (depending on how well they knew particular candidates), office visits and discussion by an Admissions Committee, and more discussion and final action by the Policy Board, Price Waterhouse's governing body. Pet. App. 5a, 41a-42a. The admissions process is collegial in the broadest sense, with actors able to exert influence at myriad points along the path and—as the district court found—with special weight accorded negative views. Pet. App. 50a.

Ann Hopkins received a glowing nomination from her local office, Pet. App. 4a, and was one of 88 senior managers at Price Waterhouse considered for partnership in the 1982-83 admissions cycle. The other 87 candidates were men. At the time, Price Waterhouse had 662 partners nationally, of whom 7 were women. Hopkins had secured some \$40 million in new business for the firm, more than any other candidate. She also had more billable hours than any of the men, and her clients were "very pleased" with her work. Pet. App. 43a.

In early 1983 Hopkins was notified that she had not been selected as a partner. At that point, she discussed her chances for future selection with the partner-in-charge of her office, who the district court found was "re-

sponsible for telling her what problems the Policy Board had identified with her candidacy." Pet. App. 52a. He advised her to

walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.

*Id.* Later, after again being passed over for partnership, Hopkins began the administrative process that culminated in this litigation.

The district court treated this case as one of mixed lawful-unlawful motivation, noting that some partners raised nondiscriminatory concerns about respondent. But the court also expressly found that discrimination based on sex infected Price Waterhouse's consideration of Hopkins' candidacy, Pet. App. 58a-59a, and that "denial of partnership in her specific situation was caused, in part," by this discrimination. Pet. App. 62a. These findings were grounded on an intensive examination of the partnership admissions process—including but not limited to candidate evaluations tendered by individual partners—and on the testimony of a social psychologist whom the court described as a "well qualified expert." Pet. App. 53a.

Having found that unlawful as well as lawful factors played a role in Hopkins' rejection, the district court then followed settled precedent and inquired whether Price Waterhouse had proved that Hopkins would have been rejected even in a bias-free setting. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977); *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983). The court found that Price Waterhouse had not carried its burden, and a Title VII violation was established. Pet. App. 59a-60a.

The court of appeals affirmed the trial court's finding that Price Waterhouse had violated Title VII in excluding Hopkins from partnership. Describing the firm's

argument—similar to the one made in this Court—as “nothing more than a thinly disguised quarrel with the District Court over appropriate inferences to be drawn from the evidence before it,” Pet. App. 11a, the court of appeals found “ample support” for the trial court’s finding that discrimination had “infected” the partnership selection process to Hopkins’ detriment. Pet. App. 17a. This evidence consisted of the comments made about her, including the especially telling advice from her partner-in-charge to walk, talk and dress “more femininely”; expert testimony that sexual stereotyping played a major role in Price Waterhouse’s consideration of Hopkins; and negative comments made about previous female candidates. Pet. App. 12a-17a. The court of appeals also held that, given the evidence of mixed motivation, the trial court correctly shifted the burden to Price Waterhouse “to show that the decision would have been the same absent discrimination.” Pet. App. 23a. Since petitioner could not make this showing, the court of appeals ruled that the district court properly found Price Waterhouse liable under Title VII. Pet. App. 25a.<sup>1</sup>

#### REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct, is consistent with the decisions of this Court, and does not present a conflict with any decision of any other court of appeals that warrants this Court’s review or that would make a difference in the outcome here.

1. *Introduction.* This case does not warrant review by this Court. Decisions on partnership are covered by

<sup>1</sup> Hopkins had left Price Waterhouse after being passed over for partnership the second time, and the district court declined to award relief on the grounds that she had not proved constructive discharge and had failed to present adequate proof on damages. Pet. App. 59a-62a. The court of appeals reversed this aspect of the trial court’s decision and remanded for entry of “full relief.” Pet. App. 25a-28a. Price Waterhouse does not here challenge this ruling.

Title VII, *Hishon v. King & Spalding*, 467 U.S. 69 (1984), and the courts below followed settled legal principles in determining that Price Waterhouse denied partnership status to Ann Hopkins in violation of the Act.

Price Waterhouse employs various arguments in seeking to have this Court review this liability determination. Foremost, petitioner asserts that there was no evidence that discrimination played *any* role in the decision to reject Hopkins. The problem here, of course, is that the district court found otherwise, and that finding is not clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. 564 (1985). The court of appeals considered and rejected this factual argument, and no justification exists for further review by this Court. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

Price Waterhouse also tries to suggest that it was error, in a mixed motivation case where unlawful motivation had been established, to shift the burden to the employer to prove that the same decision would have been made absent discrimination. Yet this Court’s precedents require just this approach, *Mt. Healthy*, 429 U.S. at 287, and the courts of appeals have routinely adhered to it in Title VII cases presenting questions of mixed motivation.

Ultimately petitioner is reduced to arguing that, assuming the courts below were right—as they were—in placing the burden on Price Waterhouse to prove that Hopkins would have been rejected even in a neutral setting, the proper evidentiary standard is preponderant rather than clear and convincing evidence. Petitioner did not press this point below, however, and for good reason: its resolution would make no difference in this case. Price Waterhouse did not begin to prove—under any standard—that Ann Hopkins would have been denied partnership in the absence of discrimination. Moreover, even apart from this suit, there is little if any ma-



terial distinction between the preponderant and clear and convincing standards as applied in Title VII cases, so there is no conflict warranting review by this Court. In any event, the clear and convincing standard is employed by the Equal Employment Opportunity Commission in similar cases, and its use here was proper. 29 C.F.R. 1613.271.

2. *The Clearly Erroneous Standard and the Facts.* Although ostensibly seeking review of legal issues, Price Waterhouse repeatedly argues the facts, suggesting that this was not truly a case of mixed motivation because there was no evidence that discrimination played *any* role in its rejection of respondent's candidacy. The district court, however, found otherwise. The trial court's opinion details the evidence supporting its finding of discrimination, but two points are especially instructive. The first is the advice Hopkins got from her boss, the partner-in-charge of her office, who counseled her to "walk more femininely, talk more femininely, dress more femininely," etc. Pet. App. 52a. This advice had nothing to do with Hopkins' professional bearing or appearance—she was always well turned out—but it had everything to do with her sex. Second, the partners themselves knew what was going on; as the district court found, Hopkins' "[s]upporters indicated that her critics judged her harshly due to her sex." Pet. App. 51a.

As can be seen, the district court's finding of discrimination is amply supported, and it is shielded by Rule 52. *Anderson v. City of Bessemer*, 470 U.S. at 573-74. This is especially true here, where the trial court was required to undertake detailed scrutiny of a complex and multifaceted partnership admissions process.

In its petition, Price Waterhouse concentrates on trying to discredit the testimony—indeed the field of expertise—of Hopkins' expert. But the criticisms are the same ones made in the court of appeals, which properly

disposed of them. The court observed that the expert was operating within the standards of her discipline in concluding that sexual stereotyping played a "major determining role" in petitioner's decision to reject respondent's candidacy, and it noted that other evidence—including the "extremely small number" of female partners at Price Waterhouse and the "positive assessments of Hopkins in areas where performance could be measured objectively"—supported that conclusion. Pet. App. 14a-15a.<sup>2</sup>

More important, the expert testimony was not the only evidence of discrimination relied on by the district court. Conspicuously absent from the petition is any reference to the advice that Hopkins' boss gave her to behave "more femininely." This is direct evidence of discrimination, which the dissent below referred to as a "smoking gun." Pet. App. 31a. Indeed, it is remarkable that such proof could be adduced in a case involving sophisticated professionals. The dissent recognized that this evidence had to be addressed, although it did so only by incorrectly arguing that the district court was clearly erroneous in attaching significance to it. *Id.* Petitioner may be reluctant to make such an unvarnished assertion of clear error in this Court, so it simply ignores the "smoking gun" altogether. But it remains, and it is central to this case.

The district court concluded that Price Waterhouse did nothing to address the "conspicuous problem" of sexual stereotyping in its admissions process and that, instead, the process gave "substantial weight" to comments influenced by such stereotypes. These factors "combined to

<sup>2</sup> Although petitioner here casts aspersions on the expert's competence and her field, the court of appeals observed that Price Waterhouse "failed to challenge the validity of [the expert's] discipline at trial and disavows any such challenge here." Pet. App. 15a. Moreover, at trial Price Waterhouse volunteered that it had "no objection to the expertise of this witness." 3/28/85 Tr. 540.



produce discrimination in the case of this plaintiff." Pet. App. 58a.

In assessing these findings, the record must be "viewed in its entirety." *Anderson v. City of Bessemer*, 470 U.S. at 574. From this perspective, it is plain that the district court was not clearly erroneous in finding that discrimination played a role in Price Waterhouse's rejection of Ann Hopkins' candidacy for partnership. The court of appeals carefully considered the record, and no purpose would be served by having this Court again review these factual findings. *Rogers v. Lodge*, 458 U.S. at 623.

3. *The Law.* Given its findings of fact, the legal analysis employed by the district court was unexceptional. Even Judge Williams, dissenting in the court of appeals, argued the facts, not the law. Thus he had "no quarrel" with the principle that a "party acting with one permissible motive and one unlawful one may prevail only by affirmatively proving that it would have acted as it did even if the forbidden motive were absent." Pet. App. 38a, citing *Mt. Healthy*, 429 U.S. at 287, and *NLRB v. Transportation Management Corp.*, 462 U.S. at 403. There could not be any quarrel with this basic principle, for this Court has adhered to it in many contexts involving mixed motivation. *E.g.*, *Mt. Healthy* (activity implicating the First Amendment); *NLRB v. Transportation Management Corp.* (unfair labor practice); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977) (local zoning decision allegedly motivated in part by race).

Indeed, contrary to Price Waterhouse's suggestion, this Court has made it clear that this principle applies to Title VII. *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977) ("[e]ven assuming, *arguendo*, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not

been injured because they were not qualified and would not have been hired in any event," citing *Mt. Healthy and International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977)). The Court has also made clear that *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)—upon which petitioner mistakenly relies—is "inapposite" to cases of mixed motivation, because in *Burdine* "[t]he Court discussed only the situation in which the issue is whether illegal or legal motives, but not both, were the 'true' motives behind the decision." *NLRB v. Transportation Management Corp.*, 462 U.S. at 400 n.5.

In short, this Court has provided clear guidance on the basic analytical approach to be used in cases of mixed motivation, and the circuit courts have routinely employed it where appropriate under Title VII. *Fields v. Clark University*, 817 F.2d 931, 936 (1st Cir. 1987); *Patterson v. Greenwood School Dist. 50*, 696 F.2d 293, 295 (4th Cir. 1984); *Smallwood v. United Airlines, Inc.*, 728 F.2d 614, 618 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984);<sup>3</sup> *Davis v. Board of School Commissioners of Mobile County*, 600 F.2d 470, 474 (5th Cir. 1979); *Terbovitz v. Fiscal Court of Adair County*, 825 F.2d 111, 115 (6th Cir. 1987); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985); *Caviale v. Wisconsin Department of Health and Social Services*, 744 F.2d 1289, 1296 (7th Cir. 1984); *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985) (*en banc*); *Nanty v. Burrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981); *Harbison v. Goldschmidt*, 693 F.2d 115, 117 (10th Cir. 1982); *Bell v.*

<sup>3</sup> Petitioner erroneously claims that it is unclear whether the Fourth Circuit has adopted this Court's approach to mixed motivation and seeks to disparage *Patterson v. Greenwood School Dist. 50*—which embraced this approach—by asserting that the Fourth Circuit has never since relied on *Patterson*. Pet. 14 n.6. This is not so. The Fourth Circuit expressly and prominently relied on *Patterson* in *Smallwood v. United Airlines, Inc.*, 728 F.2d at 618.

*Birmingham Linen Service*, 715 F.2d 1552, 1557 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

There is no division in the circuits warranting review by this Court on the question of the proper approach to be taken in mixed motivation cases under Title VII. *Mt. Healthy* is the polestar. Price Waterhouse's attempt to suggest a division is misguided.<sup>4</sup>

Ultimately petitioner retreats and recognizes that the legal approach taken below was consistent with this Court's decisions. Pet. 20 n.10. Price Waterhouse then quibbles whether this approach should be followed in Title VII cases, but as noted above this Court has already applied the *Mt. Healthy* analysis to Title VII. *East*

<sup>4</sup> Thus petitioner relies in part on decisions that are "inapposite" because they were traditional *Burdine* cases that did not involve findings of mixed motivation, e.g., *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986); *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), *cert. denied*, 469 U.S. 892 (1984); *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985). Petitioner also asserts that there is a split in the circuits over whether "but for" causation is required under Title VII and implies that the *Mt. Healthy* line of authority employs some other standard of causation. This ignores the fact that *Mt. Healthy* itself provides a vehicle for determining whether an unlawful motive was a "but for" cause of a challenged decision, as the Third Circuit recognized in a case relied on by petitioner, *Lewis v. University of Pittsburgh*, 725 F.2d at 916 (*Mt. Healthy* "did not deviate from the requirement of 'but for' causation; rather, its only effect was to allocate and specify burdens of proof"). This is correct and—as shown in the text—the circuits have followed the allocation of burdens specified in *Mt. Healthy*. Moreover, whether the burdens are said to be allocated in assessing liability or remedy makes no difference in result. Any differences on the basic *Mt. Healthy* approach reside within the circuits, not between them. Compare *Davis v. Board of School Commissioners of Mobile County*, 600 F.2d at 474, with *Jack v. Texaco Research Center*, 743 F.2d 1129 (5th Cir. 1984); and *Caviale v. Wisconsin Department of Health and Social Services*, 744 F.2d at 1296, with *McQuillen v. Wisconsin Education Ass'n Council*, 830 F.2d 659 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3462 (Dec. 11, 1987) (No. 87-999).

*Texas Motor Freight System v. Rodriguez*, 431 U.S. at 403 n.9. Finally, petitioner says that, assuming it was proper for the courts below to place the burden on Price Waterhouse to prove that Ann Hopkins would have been rejected for partnership even in a nondiscriminatory setting, the proper standard is preponderant rather than clear and convincing evidence.

It is of course true that not all courts use the clear and convincing formulation to describe the employer's burden once discrimination has been established. E.g., *Bibbs v. Block*, 778 F.2d at 1325 (preponderant evidence). But this is an archetypal distinction without a difference; its resolution is unlikely to affect any case and certainly would not affect the result here. For this reason, Price Waterhouse failed to press this point below, and that alone is sufficient reason to deny the writ. *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).<sup>5</sup>

In the court of appeals, Hopkins asserted that "Price Waterhouse could not make the requisite showing under either [the preponderant or clear and convincing] standard and has not suggested otherwise."<sup>6</sup> Petitioner never disputed this. Even in this Court Price Waterhouse does not contend that it proved, by a preponderance of the evidence, that Ann Hopkins would have been rejected in a nondiscriminatory setting. It did not even begin to make this showing. The partnership admissions process was broadly collegial; it gave special weight to negative views; there were any number of points along the way where influence could be exerted; and views were not always documented. As applied to Hopkins, this process

<sup>5</sup> The only reference to this point below came very late in a short footnote (n.5) in Price Waterhouse's petition for rehearing in the court of appeals.

<sup>6</sup> Reply Brief for Appellant-Cross Appellee at 27 n.11.



was infected by discrimination, as the courts below found. Given the specialized and complex nature of the admissions process as well as the absence of any effort by Price Waterhouse to purge this infection, petitioner did not show that an individual of Hopkins' outstanding objective credentials—*e.g.*, first among the candidates in business produced and hours billed—would still have been rejected even if the process had been untainted by discrimination. This failure of proof is as evident under a preponderant standard as under a clear and convincing test.

Since the same result would be reached here under either standard, this case is a poor vehicle for addressing any conflict. As a practical matter, moreover, the ostensible conflict presents at most a narrow difference in approach, and there appear to be no cases in which the outcome would have been different had a preponderant rather than a clear and convincing standard been applied. Hence addressing this issue here would at best serve limited theoretical purposes; no meaningful conflict would be resolved, and the decision would not affect the result in this case.

Finally, the Equal Employment Opportunity Commission requires use of clear and convincing evidence in the area of Federal employment, where the Commission has direct regulatory authority. 29 C.F.R. 1613.271.<sup>7</sup> Congress intended that cases of discrimination in the Federal government and the private sector be accorded the same treatment, *e.g.*, *Chandler v. Roudebush*, 425 U.S. 840 (1976), so it was proper for the courts below to employ the evidentiary standard sanctioned by EEOC.<sup>8</sup>

<sup>7</sup> In *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976), the Court noted the distinction between regulations and guidelines of EEOC and held that less weight would be accorded guidelines. The provision cited in the text, in contrast, is a binding regulation.

<sup>8</sup> This also disposes of two of petitioner's other contentions. The first is that guidance by this Court is needed for Federal employ-

If the propriety of using the preponderant or the clear and convincing standard in the mixed motivation setting is ever to be addressed, this should occur in a case in which the facts precisely paint the distinction, if any, between the two formulations, *i.e.*, where a difference in approach means a difference in result. That is not true here. On the contrary, the size and complexity of Price Waterhouse's partnership admissions process make this case an especially poor canvas for examining this issue.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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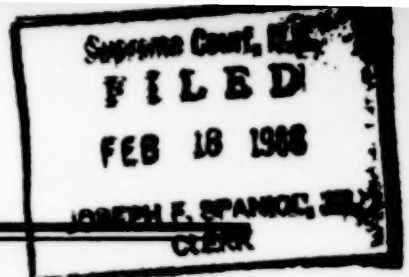
February 1988

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ment. Pet. 17 n.8. But, as is shown, the Federal sector is already governed by clear EEOC regulations. The second contention is that 42 U.S.C. 2000e-2(a)(1) requires a different approach to cases of mixed motivation under Title VII than has been taken in other contexts. Pet. 19-20. Obviously the EEOC, the agency entrusted with administering the statute, does not share this view. In this regard, see also the discussion of *East Texas Motor Freight System v. Rodriguez* at 8-9, *supra*.



No. 87-1167



**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS, RESPONDENT

---

**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit**

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**REPLY BRIEF FOR THE PETITIONER**

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**In the Supreme Court of the United States**

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**On Petition for a Writ of Certiorari to the  
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**REPLY BRIEF FOR THE PETITIONER**

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In the petition, we showed that the courts of appeals are in serious conflict over the proper allocation of the burdens and standards of proof in so-called mixed-motive cases arising under Title VII; and in this case the court of appeals itself acknowledged the existence of a conflict among the circuits (Pet. App. 20a-23a & n.8). Respondent's Brief in Opposition does not demonstrate otherwise.

1. Despite the multi-faceted split in the circuits on the appropriate allocation of the burden of proof in mixed-motive Title VII cases (see Pet. 13-17), respondent argues that "[t]here is no division in the circuits warranting review by this Court" (Br. in Opp. 10), because the Court already has decided that the defendant in a mixed-motive case bears the burden of proving that its decision would have been the same without discrimination. Respondent relies on this Court's decisions in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983);

*Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977); and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). But none of those cases involved Title VII, and none addressed the specific structure and language of that statute, which specifies that Title VII is not violated unless there is proof that the employment decision was caused by illegal motives, and which specifically prohibits courts from intervening if the employment decision was based on "any reason other than discrimination." 42 U.S.C. § 2000e-5(g). See Pet. 20 & n.10.<sup>1</sup>

The proposition that the Title VII burden of proof issue is not governed by the cited cases is demonstrated by the fact that the conflict among the circuits developed after this Court's decisions in *Transportation Management, Mt. Healthy*, and *Village of Arlington Heights*. See *McQuillen v. Wisconsin Education Ass'n Council*, 830 F.2d 659, 664 (7th Cir. 1987), petition for cert. pending, No. 87-999 (filed Dec. 11, 1987); *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175 (3d Cir. 1985), cert. denied, 475 U.S. 1035 (1986); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365-366 (4th Cir. 1985); *Jack v. Texaco Research Center*, 743 F.2d 1129,

<sup>1</sup> Respondent contends (Br. in Opp. 8-9) that the Court has applied the *Mt. Healthy* test in a Title VII case, citing *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977). Although *East Texas* was a case arising under Title VII, it did not involve any issue concerning the allocation of the burden of proof in Title VII actions. The only issue the Court decided in *East Texas* was that the court of appeals had erred in reversing the district court's dismissal of plaintiffs' class action allegations and in certifying a class on its own. In the footnote upon which respondent relies, the Court merely noted in passing that, even assuming that the employer's refusal to consider the plaintiffs' job applications had been discriminatory, the employer would have been entitled to show that the plaintiffs were not qualified for the positions they sought.

1131 (5th Cir. 1984).<sup>2</sup> Thus, it remains the case that "there is 'considerable confusion' regarding the proper standard of proof in Title VII cases." *Bellissimo*, 764 F.2d at 175. That this confusion exists within the circuits as well as among them (see Br. in Opp. 10 n.4) only underscores the need for plenary review by this Court.

2. As we demonstrated in the petition (at 15, 16), the circuits are in conflict on yet another issue presented by this case. Even those circuits that agree that the defendant must make the but-for showing in a mixed-motive case do not agree on the standard of proof: some circuits require the defendant to carry its burden by clear and convincing evidence, while others hold that the correct standard is proof by a preponderance of the evidence.

Unable to deny the existence of this conflict (see Br. in Opp. 11), respondent nevertheless urges the Court to deny the petition because the result in this case allegedly would be the same regardless of which standard is employed and because Price Waterhouse did not adequately raise the issue below. Neither contention is correct.

<sup>2</sup> Respondent contends (Br. in Opp. 10 n.4) that some of these cases did not involve "mixed-motive" situations. Respondent is incorrect. In *Ross v. Communications Satellite Corp.*, 759 F.2d at 366, for example, the Fourth Circuit clearly was referring to mixed-motive cases when it stated expressly that it "reject[ed] the view that Title VII has been violated if retaliation for protected activity was merely 'in part' a reason for the adverse action." And in *Bellissimo v. Westinghouse Elec. Corp.*, the Third Circuit reaffirmed its position that the plaintiff in a Title VII action must show that his status as a minority class member was the "but-for" reason for the challenged employment decision. The *Bellissimo* court relied on *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984)—a case the court of appeals itself recognized as being in conflict with its decision in this case. See Pet. App. 23a.

First, respondent's grudging concession (Br. in Opp. 11 n.5) that Price Waterhouse *did* in fact raise this issue below—supposedly in a “short footnote” in its petition for rehearing in the court of appeals—is incomplete. In fact, this point permeated the entire petition for rehearing.<sup>3</sup> And there was no reason for Price Waterhouse to raise the point prior to the rehearing stage because it did not become a material issue until the court of appeals rendered its decision.<sup>4</sup>

Respondent's further contention, that the choice between a preponderance standard and a clear and convincing standard is inconsequential in this or any other case, is astonishing. The District of Columbia Circuit has itself recognized that the “clear and convincing”

<sup>3</sup> In its petition for rehearing, Price Waterhouse contended, *inter alia*, that the majority opinion had erroneously sanctioned a reduced evidentiary burden for Title VII plaintiffs. Among other things, Price Waterhouse took issue with the majority's application of the clear and convincing standard:

Where a plaintiff satisfies the reduced burden [sanctioned by the majority opinion], liability is found even though the employer may have demonstrated by a “preponderance of the evidence” a “determinative” nondiscriminatory basis for the decision. Under the majority's formulation, the employer can avoid liability only by proving by “clear and convincing” evidence that the nondiscriminatory basis was determinative \* \* \*.

Pet. for Rehearing 5; see also *id.* at 7, 8 n.3, 11.

<sup>4</sup> The district court discussed the standard of proof issue only in the context of considering an appropriate remedy for the violation it found. Pet. App. 59a. The district court ultimately concluded that Hopkins was not entitled to any affirmative relief. Thus, there was no reason for Price Waterhouse to challenge the district court's statement that the employer must demonstrate by clear and convincing evidence that its decision would have been the same absent discrimination, because that statement had no effect on the relief ordered by the district court. It was not until the court of appeals' decision on liability and its remand for further proceedings on the question of remedy that the standard of proof issue became ripe for meaningful challenge.

standard imposes an “extraordinary and difficult” burden on the employer; *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983); and this Court has stressed that “adopting a ‘standard of proof is more than an empty semantic exercise.’” *Addington v. Texas*, 441 U.S. 418, 425 (1979) (citation omitted).

This case illustrates the common sense of these statements. The court of appeals found Price Waterhouse liable solely “[b]ecause Price Waterhouse could not demonstrate *by clear and convincing evidence* that impermissible bias was not the determinative factor” in the firm's decision to place Hopkins' partnership candidacy on “hold” for at least one year. Pet. App. 25a (emphasis added). The factual findings made by the district court demonstrate that it is highly unlikely that the court of appeals could have reached that result under a “preponderance” standard. To summarize, the district court found that (1) “[Hopkins] had considerable problems dealing with staff and peers,” (2) “[Hopkins'] conduct provided ample justification for the complaints that formed the basis of the Policy Board's decision” to place Hopkins' partnership bid on “hold,” (3) “[i]t is clear that the complaints about [Hopkins'] interpersonal skills were not fabricated as a pretext for discrimination,” (4) “Price Waterhouse had legitimate, nondiscriminatory reasons for distinguishing between [Hopkins] and the male partners with whom she compared herself,” (5) “the firm's emphasis on negative comments [about Hopkins] did not, by itself, result in any discriminatory disparate treatment,” and (6) “the comments of the individual partners and the expert evidence \* \* \* [did] not prove an intentional discriminatory motive or purpose.” Pet. App. 46a-47a, 48a, 50a, 54a, 59a. Based on these findings, the district court was unable to conclude that Hopkins “would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations.” *Id.* at 59a.



In view of these findings, it is a fair conclusion that application of the "clear and convincing" standard played a decisive role in the outcome of this case. If Price Waterhouse's proof, all of which was accepted in the district court's factual findings, was insufficient to meet a preponderance of the evidence standard, then it is clear that *no* defendant could ever satisfy its evidentiary burden. That, obviously, is why the court of appeals went out of its way to specify that Price Waterhouse's burden was to prove nondiscrimination by "clear and convincing" evidence. And that is why the conflict in the circuits on the standard of proof issue warrants review by this Court.<sup>5</sup>

3. We need not dwell on respondent's contention that Price Waterhouse's real quarrel is with the facts found by the district court and affirmed by the court of appeals. (Respondent's own recitation of the facts in this connection is lopsided. Respondent simply ignores the facts justifying the district court's finding that there existed a legitimate, nondiscriminatory basis for the firm's decision. Instead, respondent belabors (Br. in

<sup>5</sup> Respondent relies (Br. in Opp. 12) on a regulation promulgated by the Equal Employment Opportunity Commission that requires an agency found to have discriminated against an applicant for employment to "offer the applicant employment of the type and grade denied him or her, unless the record contains clear and convincing evidence that the applicant would not have been hired even absent discrimination." 29 C.F.R. § 1613.271. But this regulation applies only to federal administrative proceedings, not to judicial proceedings involving *either* federal or private sector employees. Indeed, the inapplicability of the EEOC's regulation to judicial proceedings is clearly demonstrated by *Bibbs v. Block*, 778 F.2d 1318, 1324 n.5 (8th Cir. 1985) (en banc). The case involved a federal employee's Title VII claim, but the court expressly rejected the clear and convincing standard in favor of the preponderance standard. In federal *administrative* proceedings, the government is of course free to impose a higher burden upon itself than Title VII requires, but the EEOC has no authority to establish rules of decision for the federal courts.

Opp. 3, 4, 6, 7) a single comment, made *after* the partnership decision and not in any way part of the partnership decisionmaking process.<sup>6</sup>) As the petition and the foregoing discussion make clear, Price Waterhouse is asking this Court to resolve significant issues of law that will ensure the fair and even-handed enforcement of the civil rights laws in accordance with congressional intent.

It is, of course, true that we are asking this Court not only to decide whether the burden of persuasion should shift in Title VII cases, but if so, also to consider the question of what categories of cases are appropriate candidates for any such shift. As we explained in the petition (at 23-26), the court of appeals was able to evade *Burdine's* allocation of the burden of proof in Title VII cases only by characterizing this case as a "mixed-motive" situation, and did so on the basis of gossamer evidence, including the testimony of an expert who had never met Hopkins and who knew nothing of Hopkins' actual behavior at Price Waterhouse. This obviously raises the fundamental question of what are the proper predicates for finding that a case involves "mixed motives." Contrary to respondent's contention (Br. in Opp. 6-8), we do not challenge the lower courts' findings under the clearly erroneous standard; rather, we ask the Court to address the legal question of the *character* of the evidence needed to trigger a "mixed-motive" analysis. As Professor Jaffe has explained, "[t]he application of law requires a fac-

<sup>6</sup> Hopkins testified that *after* her partnership candidacy had been placed on "hold," the partner in charge of her local office and her strongest supporter, Mr. Beyer, advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Pet. App. 52a (citing Tr. 102, 316). The record is clear that Mr. Beyer's advice was an entirely personal reaction to her situation and gives no probative insight into the actual reasons for her rejection. See Tr. 87-95, 168, 212-213. As Judge Williams correctly recognized in dissent (Pet. App. 31a-32a), the record provides absolutely no support for attributing Mr. Beyer's personal views to the Policy Board.

tual predicate; an action without such a predicate is lawless." Jaffe, *Judicial Review: Questions of Fact*, 69 Harv. L. Rev. 1020, 1021 (1956).

Clearly, the Court cannot sensibly decide how the burden of proof in Title VII cases should be allocated without considering the types of cases to which any rule of law that it announces will apply. And this case is appropriate for review precisely because it provides such a vivid illustration of the danger that a new burden of proof rule will be applied on the basis of such ephemeral factual predicates that *Burdine's* fundamental rule will be completely eroded.

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1988

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No. 87-1167

Supreme Court, U.S.

FILED

JUN 30 1988

JOSEPH E. SPANIO, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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**PRICE WATERHOUSE, PETITIONER**

**v.**

**ANN B. HOPKINS, RESPONDENT**

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**On Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit**

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**JOINT APPENDIX**

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**PETITION FOR A WRIT OF CERTIORARI FILED JANUARY 12, 1988  
CERTIORARI GRANTED MARCH 7, 1988**

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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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No. 87-1167  
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PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS, RESPONDENT  
\_\_\_\_\_

**On Writ of Ceritorari to the United States  
Court of Appeals for the District of Columbia Circuit**  
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**JOINT APPENDIX**  
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UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

Civil Action No. 84-3040

ANN B. HOPKINS, PLAINTIFF,

v.

PRICE WATERHOUSE, DEFENDANT.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1984		
Sep 28	1	COMPLAINT, appearance, jury demand. (ew)
Sep 28	2	FIRST set of interrogatories by pltffs. to deft. (ew)
Sep 28	3	FIRST request by pltffs to deft. for production of documents. (ew)
Oct 22	4	ANSWER by deft. to the complaint. (ew)
		* * * * *
Oct 30		SCHEDULING CONFERENCE: Pretrial set for 3/4/85 at 9:00 a.m.; trial set for 3/25/85 at 9:30 a.m. (Rep: S. Zizzo) GESELL, J. (ew)
		* * * * *
Nov 19	6	ORDER filed 11-14-84 that the stipulation and protective order submitted to the court by counsel is not acceptable and the court's approval is withheld; the terms thereof are too cumbersome, will delay progress of discovery, and no showing of necessity has been made; a limited simpler stipulation may be presented for consideration. (N) GESELL, J. (io)

DATE	NR.	PROCEEDINGS
1984		
Nov 27	7	PRETRIAL ORDER setting final pretrial in Courtroom 6 at 9:00 on 3/4/85; setting forth instructions to trial counsel; directing all discovery must be completed by 2/20/85; commencing trial on 3/25/85 at 9:30 a.m. (N) GESELL, J.
Dec 6	8	RESPONSES by defts. to pltffs first request for production of documents. (ew)
Dec 6	9	RESPONSES by defts. to pltffs first set of interrogatories; Exhibits A-D. (ew)
Dec 11	10	STIPULATION and Protection order that the following limitations shall apply to those documents of Price Waterhouse which relate to its present or former employees and partners and which the parties stipulate to be "protected documents all such documents will be marked on the first page with the "PROTECTED DOCUMENTS." (N) GESELL, J. (ew)
Dec 18	11	FIRST request by pltffs. for admissions to deft. (ew)
1985		
Jan 15	12	RESPONSES by defts. to pltffs first requests for admissions. (ew)
Jan 22	13	FIRST request by defts. to pltff. for production of documents. (ew)
Jan 22	14	FIRST interrogatories by defts. to pltff. (ew)
Jan 26	15	SUPPLEMENTAL discovery requests by pltffs. (ew)

\* \* \* \* \*

DATE	NR.	PROCEEDINGS
1985		
Feb 14	17	STIPULATION AND ORDER for dismissal without prejudice to pltf's right to pursue District of Columbia Human Rights Act Claims in the Superior Court of the District of Columbia. The aforementioned claims constitute Count Two of the current Complaint; so ordered. "This Court expresses no view as to whether or not the Superior Court may entertain Count Two.: (fiat) (N) GESELL, J. (mf)
Feb 22	18	ORDER filed 2/19/85 granting joint motion extending deadline for conducting all discovery to and including 3/12/85; rescheduling pretrial conference to 3/14/85 at 9:00 a.m.; directing that trial shall begin on 3/25/85 at 9:30 a.m. The Court has no time available for this case in early April. Suggest video deposition for absent witness. (N) GESELL, J (mf)
Feb 28	19	RESPONSE by pltffs. to defts. first request for production of documents. (ew)
Feb 28	20	ANSWERS by pltffs. to defts interrogatories. (ew)
Mar 5	21	RESPONSES by defts. to pltffs supplemental discovery requests; Exhibits. (ew)
Mar 14	22	LIST OF WITNESSES by deft. (ef)
Mar 14	23	LIST OF TRIAL EXHIBITS by deft. (ef)
Mar 14	24	TRIAL BRIEF by deft. (ef)
Mar 14	25	PRETRIAL Package by pltf'; Witness List; Exhibit List; Trial Brief; Proposed Findings of Fact 1. (ef)
Mar 14		PRETRIAL conference held. Rep: S. Zizzo GESELL, J. (ef)



DATE	NR.	PROCEEDINGS
1985		
Mar 22	26	DEPOSITION OF Lewis J. Krulwich taken on behalf of plttf on 3/8/85. (ew)
Mar 22	27	DEPOSITION OF Donald Eplebaum taken on behalf of plttf on 3/8/85. (ew)
Mar 22	28	DEPOSITION OF Ann B. Hopkins taken on behalf of deftt on 3/8/85; Vol. II. (ew)
Mar 22	29	DEPOSITION OF Ann B. Hopkins taken on behalf of deftt on 2/22/85. (ew)
Mar 22	30	DEPOSITION OF Donald R. Ziegler taken on behalf of plttf on 3/1/85. (ew)
Mar 22	31	DEPOSITION OF Benten B. Warder taken on behalf of plttf. on 2/12/85. (ew)
Mar 22	32	DEPOSITION OF Thomas O. Beyer taken on behalf of plttf on 2/7/85. Vol. II. (ew)
Mar 22	33	DEPOSITION OF Thomas O. Beyer taken on behalf of plttf on 2/6/85. Vol. I. (ew)
Mar 22	34	EXAMINATION BEFORE TRIAL of deftt. Joseph E. Connor on 3/12/85. (ew)
Mar 22	35	EXAMINATION BEFORE TRIAL of deftt Paul Goodstat on 3/12/85. (ew)
Mar 22	36	EXAMINATION BEFORE TRIAL of Joseph E. Connor on 3/12/85. (2 video tapes) (ew)
Mar 25		TRIAL by Court begun; respited until 9:30 a.m. on 3/26/85. (Rep: S. Zizzo) GESELL, J. (mf)
Mar 26		TRIAL by court resumes; respited until 3/27/85 at 9:30 a.m. (rep: S. Zizzo) GESELL, J. (ew)
Mar 27		TRIAL BY COURT resumes; respited until 9:30 a.m. on 3/28/85. (Rep: S. Zizzo) GESELL, J. (ew)

DATE	NR.	PROCEEDINGS
1985		
Mar 28		TRIAL BY COURT resumes and respited until 3/29/85 at 9:30 a.m. (Rep: S. Zizzo) GESELL, J. (ew)
Apr 9	37	JOINT motion by plttf. and deftt. to correct Connor testimony transcript. (ew)
Apr 10	38	ORDER granting joint motion to correct Connor Testimony transcript; the Clerk will make the original of the typed transcript of the 3/12/85 deposition of Joseph E. Connor filed in this case available to a properly identified atty or employee of the firm of Gibson, Dunn & Crutcher, within the Clerk's office and will allow that person to make ink corrections that have been agreed to by both parties on the original transcript. (N) GESELL, J. (ew)
Apr 12	39	TRANSCRIPT OF PROCEEDINGS of March 25, 1985; courts copy; pages 1-178; Rep: S. Zizzo. (ew)
Apr 12	40	TRANSCRIPT OF PROCEEDINGS of March 26, 1985; courts copy; pages 179-300; Rep: S. Zizzo. (ew)
Apr 12	41	TRANSCRIPT OF PROCEEDINGS of March 27, 1985; courts copy; pages 301-448A; Rep: S. Zizzo. (ew)
Apr 12	42	TRANSCRIPT OF PROCEEDINGS of March 28, 1985; courts copy; pages 449-663; Rep: S. Zizzo. (ew)
Apr 12	43	TRANSCRIPT OF PROCEEDINGS of March 29, 1985; courts copy; pages 664-730; Rep: S. Zizzo. (ew)
May 3	44	PROPOSED FINDINGS OF FACT by deftt.; Index. (mf)

DATE	NR.	PROCEEDINGS
1985		
May 10	45	POST-TRIAL brief by pltffs. (ew)
May 10	46	POST-TRIAL brief by defts. (ew)
May 17	47	ORDER filed 5-15-85 directing each party to provide, in writing, which of the other's proposed findings it will not challenge, and to file copies with the Court no later than 4:30 p.m. on 5-24-85. (N) GESELL, J. (gh)
May 24	48	RESPONSE by defts. to pltffs proposed findings of fact. (ew)
May 24	49	REPLY by defts. to pltffs post-trial brief. (ew)
May 24	51	REPLY brief by pltffs. (ew)
May 29		CLOSING ARGUMENTS begun, concluded and taken under advisement. (Rep: Santa Zizzo). GESELL, J. (dc)
Jul 9	52	TRANSCRIPT OF PROCEEDINGS of 5/29/85; courts copy; pages 1-64; Rep: S. Zizzo. (ew)
Sept 20	53	MEMORANDUM. (N)
Sept 20	54	ORDER dismissing the Complaint; awarding pltf. her reasonable attorney's fees plus cost to be set by the clerk; directing that the parties shall attempt to agree on an amount to compensate for such reasonable attorney's fees and advise the Court in writing on or before 9/30/85, whether further proceedings to establish the fee award will be necessary. (N) GESELL, J. (br)
* * * * *		
Oct 18	57	NOTICE OF APPEAL by pltf. from order filed 9/20/85. \$5.00 filing fee and \$65.00 docketing fee paid and credited to U.S. Copy mailed to Stephen E. Tallent. (br)

DATE	NR.	PROCEEDINGS
1985		
Oct 18		PRELIMINARY RECORD transmitted to USCA; USCA# 85-6052.
Oct 25	58	NOTICE OF APPEAL by deft. from order filed 9/20/85 \$5.00 filing fee and \$65.00 docketing fee paid and credited to U.S. Copy mailed to Douglas B. Huron. (br)
Oct 28		PRELIMINARY RECORD transmitted to USCA; USCA# 85-6097.
* * * * *		
Dec. 09	62	ORDER filed 12-6-85 staying matter pending final decision on appeal. (N) USCA/N RECEIPT ACKNOWLEDGED. GESELL, J. (la)
* * * * *		
1986		
Sep. 09		RECORD ON APPEAL delivered to USCA. RECEIPT ACKNOWLEDGED 9-10-86. (1a)
Sep. 18	64	MOTION by deft. Price Waterhouse to have certain trial exhibits made part of the record on appeal. USCA/N (1a) (EXHIBITS—in box)
Sep. 19		SUPPLEMENTAL RECORD ON APPEAL. RECEIPT ACKNOWLEDGED. (1a) (Motion re: exhibits)
Sep. 24	65	CERTIFIED copy of Order from USCA dated 9-24-86, sua sponte, directing the parties to file with the Clerk of USDC the following exhibits: Defendant's exhibits #27; 30; 31; 63 & 68; Plaintiff's exhibits #20 & #21. (USCA#85-6052) (USCA#85-6097) (1a)
Sep. 25	65	TRIAL EXHIBITS of Deft. #27; 30; 31; 63; 68 pursuant to Order from USCA. (USCA #85-6052 & 85-6097 (1a) (#31 in black notebook binder; #68 in binder)

DATE	NR.	PROCEEDINGS
1986		
Sep. 25		SUPPLEMENTAL RECORD ON APPEAL of defts. trial exhibits #27; 30; 31; 63 & 68 delivered to USCA. (USCA#85-6052 & 85-6097) (la)
Sep. 29	66	NOTICE OF FILING by pltf., Trial exhibits #20 & #21. (la)
Sep. 29	67	RESPONSE by pltf. to motion to include certain exhibits in record on appeal, attachment. (EXHIBIT—exh. #12-15, 22-25) (la)
Oct. 02	68	ORDER directing pltf's exhibits Nos. 12, 13, 14, 15, 22, 23, 24, 25 and deft's exhibits Nos. 11, 13, 14, 17, 37, 53, 57, 64 & 76 be made part of the record on appeal in the consolidated cross-appeals in this action before the USCA for D.C. Circuit in Nos. 85-6052 & 85-6097. (N) GESELL, J. (la)
Oct. 02	68	TRIAL EXHIBITS of pltf., Nos. 12, 13, 14, 15, 22, 23, 24 & 25. (la)
Oct. 02	69	TRIAL EXHIBITS of deft., Nos. 11, 13, 14, 17, 37, 53, 57, 64 (IN (3) Black Binders and #76. (la)
Oct. 02		SUPPLEMENTAL RECORD ON APPEAL delivered to USCA consisting of Trial Exhibits of pltf. & deft. RECEIPT ACKNOWLEDGED. 10-2-86 (la)
1987		
Oct. 19	70	CERTIFIED copy of judgment from USCA dated 8-4-87 AFFIRMING in part, REVERSING in part judgment of USDC and REMANDING cases to USDC in accordance with the opinion. OPINION. (USCA#85-6052 & 85-6097) (la)

DATE	NR.	PROCEEDINGS
1987		
Oct. 29		STATUS CONFERENCE ON REMAND: Oral motion of deft. to stay case pending certiorari to the Supreme Court heard 10/27/87 and denied; deft. indicated he will try to have the mandate stayed in the USCA. Rep: S. Zizzo. GESELL, J. (gd)
Nov. 06	71	CERTIFIED copy of Order from USCA dated 11-5-87 Granting appellee/cross-appellant's motion for recall of mandate issued 10-16-87; Further Ordered Partially Granting the motion for stay of mandate & the Clerk is directed to delay reissuance of the mandate through 11-30-87. No further stay of issuance of the mandate will be granted. (USCA#85-6052 & 85-6097) CD/N Becki/N Mandate Returned. RECEIPT ACKNOWLEDGED 11-16-87. (la)
* * * * *		
Nov. 27		SUPPLEMENTAL RECORD ON APPEAL delivered to USCA. (#72; #73 & #74) RECEIPT ACKNOWLEDGED 11-18-87. (la)
Dec. 08	75	CERTIFIED copy of Judgment from USCA dated 8-4-87 Affirming In Part and REVERSING In Part the Judgment of USDC and REMANDING these cases to USDC in accordance with the Opinion. OPINION. (USCA#85-6052 & 85-6097) (la)

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DATE	NR.	PROCEEDINGS
1988		
Mar. 08	80	TRANSMITTAL LETTER FROM USCA returning original record (2) volumes; (6) transcripts; (11) depositions. SUPPLEMENTAL RECORD of 9-25-86 & 9-26-86 & 10-7-86. (USCA# 85-6052 & 85-6097) (la)
* * * * *		
Mar 22	82	STIPULATION filed 3/21/88 and request for order staying proceedings, granted. So Ordered. (fiat) (N) GESELL, J. (gd)

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
No. 85-6052

ANN B. HOPKINS, APPELLANT

v.

PRICE WATERHOUSE

\_\_\_\_\_  
Appeal from the United States District Court  
for the District of Columbia  
(Civil Action No. 84-3040)

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
(B) 10-31-85	Copy of notice of appeal and docket entries from Clerk, DC (n-2)
(B) 10-31-85	Docketing fee was paid in the District Court on 10-18-85
(B) 10-31-85	Docketing statement was mailed to counsel for appellant
(E) 11-15-85	4-Appellant's docketing statement (m-15) [ #15, #23]
(E) 11-19-85	4-Appellant's docketing statement (m-18) [87# '21#]

DATE	FILINGS—PROCEEDINGS
(E)12-17-85	Clerk's order, <i>sua sponte</i> , that Nos. 85-6052 and 85-6097 are consolidated as cross-appeals, and a briefing schedule is set as follows: Appellant's (Hopkins) brief and appendix or record excerpts—Feb. 10, 1986; Appellee/cross-appellant's (Price Waterhouse) brief—Mar. 21, 1986; Cross-appellee/appellant's brief—April 21, 1986; and Cross-appellant's reply brief, if any—May 5, 1986.
(T)02-10-86	15-APPELLANT/CROSS-APPELLEE'S BRIEF (p-10) [Bin 31-4]
(T)02-10-86	7-RECORD EXCERPTS (p-10)
(T)03-21-86	15-APPELLEE/CROSS-APPELLANT'S BRIEF (p-21)
(T)03-21-86	7-RECORD EXCERPTS (p-21)
(T)04-11-86	15-APPELLEE/CROSS-APPELLANT'S CORRECTED BRIEF (m-11)
(T)04-21-86	15-APPELLANT/CROSS-APPELLEE'S REPLY BRIEF (p-21)
(E)05-06-86	15-CROSS-APPELLANT'S REPLY BRIEF (m-5)
(J)09-11-86	CERTIFIED ORIGINAL RECORD—2 vols.; 6 transcripts under 2 separate covers and 11 depositions
(J)09-24-86	Clerk's order, <i>sua sponte</i> , that the parties are directed to file with the Clerk of the District Court the following exhibits: Defendant's Exhibits; #27, #30, #31, #63 and #68; Plaintiff's Exhibits; #20 and #21; and that the Clerk of the District Court is directed to certify and transmit the aforementioned exhibits in the above entitled case as a supplemental record on appeal.

DATE	FILINGS—PROCEEDINGS
(C)09-26-86	CERTIFIED ORIGINAL SUPPLEMENTAL RECORD—defendant's exhibits requested by court order filed 9/24/86
(J)10-01-86	Clerk's order, <i>sua sponte</i> , that the following times are allotted for oral argument: Appellant/cross-appellee—25 minutes; Appellee/cross-appellant—25 minutes
(J)10-07-86	CERTIFIED ORIGINAL SUPPLEMENTAL RECORD—trial exhibits
(J)10-23-86	ARGUED before Edwards, Williams, CJs and Green, U.S. District Court Judge for the District of Columbia. (BIN 58-6)
(D)08-04-87	Opinion for the Court filed by District Judge Green.
(D)08-04-87	Dissenting opinion filed by Circuit Judge Williams.
(D)08-04-87	Judgment by this Court that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part, and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.
(D)08-04-87	Mandate order.
	* * * * *
(R)09-03-87	20-Appellee/cross appellant's petition for rehearing and suggestion for rehearing en banc (m-3) [1]
(R)09-08-87	20-Appellee/cross appellant's corrected petition for rehearing and suggestion for rehearing en banc (m-8) [1]
(R)09-10-87	20-Appellant/cross-appellee's motion to disqualify Circuit Judge D.H. Ginsburg (m-1C) [1]

DATE	FILINGS—PROCEEDINGS
(J) 09-30-87	Per Curiam order denying petition for rehearing of appellee/cross-appellant. Edwards, Williams, CJs and Joyce H. Green, District Judge, U.S. District Court for the District of Columbia
(J) 09-30-87	Per Curiam order en banc denying suggestion for rehearing en banc of appellee/cross-appellant. CJ Wald, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.H. Ginsburg, CJs.
(D) 10-16-87	MANDATE ISSUED. Costs will be determined at a later date.
(R) 11-02-87	6-Appellee/cross appellant's petition for recall of mandate and for stay of mandate (m-2) [1]
(J) 11-05-87	Per Curiam order that the motion for recall of mandate is granted and the mandate of this court issued on October 16, 1987 is recalled. The Clerk of the District Court is directed to return said mandate promptly and that the motion for stay of mandate is partially granted and the Clerk is directed to delay reissuance of the mandate through November 30, 1987. No further stay of issuance of the mandate will be granted. Edwards, Williams, CJs and Joyce H. Green, District Judge, US District Court for the District of Columbia.
(J) 11-16-87	Return of the mandate from the U.S. District Court for the District of Columbia
(J) 11-16-87	Clerk's order that costs are awarded to appellant/cross-appellee in the amount of \$309.25 and that attorneys' fees are awarded to appellant/cross-appellee in the amount of \$20,886.50. The Clerk is directed to include a certified copy of the order in the mandate of the court at such time as it is issued.

DATE	FILINGS — PROCEEDINGS
(J) 11-25-87	CERTIFIED ORIGINAL SUPPLEMENTAL RECORD—(request for documents)
(D) 12-08-87	MANDATE RE-ISSUED.
(R) 01-15-88	Notice from Clerk, Supreme Court advising that petition for certiorari was filed in SC #87-1167 on 01-12-88 [1]
(G) 02-11-88	3-TRANSCRIPT OF ORAL ARGUMENT [1]
(R) 03-07-88	Letter from Clerk, Supreme Court advising that petition for writ of certiorari was granted on 03-07-88 in SC #87-1167 [1]
(T) 02-02-88	RECEIPT FROM DISTRICT COURT FOR RECORD



UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
No. 85-6097

ANN B. HOPKINS

v.

PRICE WATERHOUSE, APPELLANT

\_\_\_\_\_  
Appeal from the United States District Court  
for the District of Columbia  
(Civil Action No. 84-3040)

\_\_\_\_\_  
RELEVANT DOCKET ENTRIES

DATE	FILINGS — PROCEEDINGS
(B) 11-22-85	Copy of notice of appeal and docket entries from Clerk, DC (n-2)
(B) 11-22-85	Docketing fee was paid in the District Court on 10-25-85
(B) 11-22-85	Docketing statement was mailed to counsel for appellant
(E) 12-03-85	4-Appellant's docketing statement (m-3) [#15, #23]
(B) 12-10-85	Notice from Clerk, DC with copy of DC order staying decision on attorneys fees

DATE	FILINGS — PROCEEDINGS
(E) 12-17-85	Clerk's order, <i>sua sponte</i> , that Nos. 85-6052 and 85-6097 are consolidated as cross-appeals, and a briefing schedule is set as follows: Appellant's (Hopkins) brief and appendix or record excerpts—Feb. 10, 1986; Appellee/cross-appellant's (Price Waterhouse) brief—Mar. 21, 1986; Cross-appellee/appellant's brief—April 21, 1986; and Cross-appellant's reply brief, if any—May 5, 1986.
(T) 02-10-86	15-APPELLANT/CROSS-APPELLEE'S BRIEF (p-10) [Bin]
(T) 02-10-86	7-RECORD EXCERPTS (p-10)
(T) 03-21-86	15-APPELLEE/CROSS-APPELLANT'S BRIEF (p-21)
(T) 03-21-86	7-RECORD EXCERPTS (p-21)
(T) 04-11-86	15-APPELLANT/CROSS-APPELLANT'S CORRECTED BRIEF (m-11)
(T) 04-21-86	15-APPELLANT/CROSS-APPELLEE'S REPLY BRIEF (p-21)
(E) 05-06-86	15-CROSS-APPELLANT'S REPLY BRIEF (m-5)
(J) 09-11-86	CERTIFIED ORIGINAL RECORD—2 vols.; 6 transcripts under 2 separate covers and 11 depositions
(J) 09-24-86	Clerk's order, <i>sua sponte</i> , that the parties are directed to file with the Clerk of the District Court the following exhibits: Defendant's Exhibits; #27, #30, #31, #63 and #68; Plaintiff's Exhibits; #20 and #21; and that the Clerk of the District Court is directed to certify and transmit the aforementioned exhibits in the above entitled case as a supplemental record on appeal

DATE	FILINGS — PROCEEDINGS
(C) 09-25-86	CERTIFIED ORIGINAL SUPPLEMENTAL RECORD—motion to have certain exhibits made part of the record
(C) 09-26-86	CERTIFIED ORIGINAL SUPPLEMENTAL RECORD—defendant's exhibits requested by court order filed 9/24/86
(J) 10-01-86	Clerk's order, <i>sua sponte</i> , that the following times are allotted for oral argument: Appellant/cross-appellee—25 minutes; Appellee/cross-appellant—25 minutes
(J) 10-07-86	CERTIFIED ORIGINAL SUPPLEMENTAL RECORD—trial exhibits
(J) 10-23-86	ARGUED before Edwards, Williams, CJs and Green, U.S. District Court Judge for the District of Columbia. (Bin 58-6)
(D) 08-04-87	Opinion for the Court filed by District Judge Green.
(D) 08-04-87	Dissenting opinion filed by Circuit Judge Williams.
(D) 08-04-87	Judgment by this Court that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part, and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.
(D) 08-04-87	Mandate order.
	* * * * *
(R) 09-03-87	20-Appellee/cross-appellant's petition for rehearing and suggestion for rehearing en banc (m-3 [1])
(R) 09-08-87	20-Appellee/cross appellant's corrected petition for rehearing and suggestion for rehearing en banc (m-8) [1]

DATE	FILINGS — PROCEEDINGS
(R) 09-10-87	20-Appellant/cross-appellee's motion to disqualify Circuit Judge D.H. Ginsburg (m-10) [1]
(D) 10-16-87	MANDATE ISSUED. Costs will be determined at a later date.
(R) 11-02-87	6-Appellee/cross appellant's petition for recall of mandate and for stay of mandate
(J) 11-05-87	Per Curiam order that the motion for recall of mandate is granted and the mandate of this court issued on October 16, 1987 is recalled. The Clerk of the District Court is directed to return said mandate promptly and that the motion for stay of mandate is partially granted and the Clerk is directed to delay reissuance of the mandate through November 30, 1987. No further stay of issuance of the mandate will be granted. Edwards, Williams, CJs and Joyce H. Green, District Judge, U.S. District Court for the District of Columbia
(J) 11-16-87	Return of the mandate from the U.S. District Court for the District of Columbia
(J) 11-16-87	Clerk's order that costs are awarded to appellant/cross-appellee in the amount of \$309.25 and that attorneys' fees are awarded to appellant/cross-appellee in the amount of \$20,886.50. This Clerk is directed to include a certified copy of this order in the mandate of the court at such time as its issue
(J) 11-25-87	CERTIFIED ORIGINAL SUPPLEMENTAL RECORD
(D) 12-08-87	MANDATE RE-ISSUED.

DATE	FILINGS — PROCEEDINGS
(R) 01-15-88	Notice from Clerk, Supreme Court advising that petition for certiorari was filed in SC #87-1167 on 01-12-88 [1]
(G) 02-11-88	3-TRANSCRIPT OF ORAL ARGUMENT [1]
(R) 03-07-88	Letter from Clerk, Supreme Court advising that petition for writ of certiorari was granted on 03-07-88 in SC #87-1167 [1]

**TRIAL TESTIMONY OF DR. SUSAN FISKE**  
3/28/85

[534] DR. SUSAN FISKE

appearing on behalf of the plaintiff as a rebuttal witness, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HURON:

Q Would you state your name, please.

A Susan Fiske.

Q And where are you employed?

A Carnegie Mellon University.

Q What is your position at Carnegie Mellon?

A I am an associate professor of psychology.

Q Do you have a copy in front of you of plaintiff's Exhibit No. 37?

A Yes.

Q Is that a resume of your education, experience, publications?

A It is.

Q Could you briefly summarize your educational [535] background and your experience?

A I got my undergraduate degree at Harvard in 1973. I also got my graduate degree there, my Ph.D. in 1978 in social psychology. My employment has been—since I finished my Ph.D. I have been at Carnegie Mellon University first as an assistant professor and then as an associate professor.

Q Looking at the beginning to page 2 of Plaintiff's Exhibit 37, does this set forth your publications?

A Yes.

Q I'd like to ask a few questions about your experience and education in the field of—general field of stereotypes. Can you define first of all—



THE COURT: What did you call the field so I understand it?

MR. HURON: Stereotype. And I am going to ask first whether that is a recognized concept within your discipline.

THE WITNESS: Stereotyping is a concept that has existed in social psychology since the beginning of the existence of the discipline, since the early part of this century and it is one of the central concepts in my discipline.

BY MR. HURON:

Q And could you briefly define what stereotyping is?

A A stereotype is a set of beliefs that are presumed to be true about a person on the basis of categorizing them [536] within any given social category and those beliefs are often negative.

Q Have you had occasion in the recent past to do a survey of the literature in your discipline on the concept of stereotyping?

A Yes, I have in two respects. Stereotyping has been my major area of work in graduate school and since then. And I have published a number of articles in that area as well as having a National Science Foundation Grant on that. I have also recently completed a book in which we reviewed the area of stereotyping as—in a context of looking at social cognition, which is how people understand and make sense of other people, and for that book we reviewed over 1300 references.

Q You mentioned a National Science Foundation Grant. Is that something that you have now?

A Yes, it is.

Q Could you tell us what it is and a little bit about it?

A The title of the grant is affective responses to social stereotypes. It is concerned with people's evaluative and emotional responses to social stereotypes. And it is a grant proposal that was accepted by the National Science Foundation and the National Institutes of Mental Health.

Q I take it you can only choose one?

[537] A That's right. You can't be funded twice.

Q Do you happen to know how many grant proposals—what percentage of grant proposals at the National Science Foundation are accepted?

A Within my division, only 10 percent are funded.

Q Have you conducted, I think you said you have, previous research also in the area of stereotyping?

A Yes, one of the very first things that I ever worked on was in stereotyping. It was a paper that was designed to look at the effects of categorizing a person as male or female or as black or white and it examined the ways that the roles and traits that people attribute to other people are—can be a function of categorizing them according to sex or race.

Q Now, in the course of your academic work or your experience since graduating with your doctorate, have you done any study or any analysis in the general area of methodology, scientific methodology?

A Yes, I think you could fairly say that it was my major in graduate school. I was a teaching assistant in a number of methods in statistics courses, both for graduate students and undergraduate and being an expert in methodology is necessary to getting research published in my field.

Q And have you had any research published?

A Yes, I have published something in the order of over [538] a dozen articles and chapters.

Q In terms of methodology, broadly speaking, how many types of methodology are there in your discipline? Could you define them a little bit?

A Well, broadly speaking there are two kinds of research. One is laboratory experiments in which you can within a very controlled environment manipulate the conditions, the social situation, and measure the impact that that has on people. The other type of research is field research or survey research in which you can be more certain that the effects that you are observing are gen-

eralizable to the general population as a whole but you can't be as certain that the particular phenomena that you say are causing the effects are causing them, so there are trade-offs between laboratory research and survey and field research.

Q Now, how long has stereotyping been a subject of social science research?

A Well, at least since 1922.

Q And has there been one type of research that has predominated; that is, laboratory versus field work?

A No, actually stereotyping is an interesting concept because it has been researched both in the lab and in the field and the evidence from the lab and the field are quite convergent.

THE COURT: Convergent?

[539] THE WITNESS: Converging.

THE COURT: You mean concurrent.

THE WITNESS: Well, what I am trying to say is they meant the same things.

THE COURT: That is what I meant. They come out the same way.

THE WITNESS: Yes.

BY MR. HURON:

Q Dr. Fiske, have you ever sought to qualify as an expert witness in any court proceeding before?

A No.

MR. HURON: Your Honor, I'd like to at this point submit Dr. Fiske's qualifications as an expert in the field of stereotype.

MR. TALLENT: Your Honor, I have grave doubts as to whether this is proper rebuttal, as to whether Dr.—this issue, it seems to me, was raised initially by the Plaintiffs in their case which should have been part of their case in chief. It is not proper rebuttal.

THE COURT: I know you have made that position clear before. It has seemed to me that if one assumes, as I do at this stage, that a prima facie case was shown,

though you have a motion to the contrary, and that then what has happened is that you have come forward with an explanation and that the question now before me is the burden of the [540] plaintiff to show that your explanation is pretextual, it would seem to me entirely appropriate at this stage to examine your defense in the light of the expert testimony of this witness.

MR. TALLENT: I have no objection to the expertise of this witness, Your Honor.

THE COURT: I can't hear you.

MR. TALLENT: I have no objection to the expertise of the witness.

THE COURT: Well, I assume not.

MR. TALLENT: Although I do not waive any arguments with respect to the relevance of her testimony.

THE COURT: I understand that. That is partly a legal and partly a factual question we will have to iron out as we go along but we will take the testimony.

MR. HURON: At this point I'd like to move in plaintiff's Exhibit 37, Dr. Fiske's resume.

THE COURT: Yes. It will be received and it saves a lot of time.

(Whereupon, Plaintiff's Exhibit 37 was received into evidence.)

BY MR. HURON:

Q Dr. Fiske, has there been any studies in the literature in your field on the question of stereotyping based on sex in the organizational context?

[541] A Yes, there is quite a lot of research on that. There is research, just to name a few, there is research by Professor Cantor at Yale, Professor Heilman at New York University. Professor Taylor at UCLA.

Q Now, is that laboratory research or is it field research or both?

A Both.



Q Can you briefly describe which is which and what was done?

A Well, Professor Cantor, for example, did a multi-year intensive case study of a large industrial supply organization and wrote a book about it documenting stereotyping within that organization by interviews and questionnaires and so on.

Q That is field work?

A That is field work. Professor Heilman and Professor Taylor, for example, do laboratory research in which they call subjects into the laboratory and they can manipulate the particular antecedent conditions and measure the indicators more carefully.

Q Now, you testified previously it's a general proposition that research on stereotyping tends to, I think your term was, to be convergent. Is that true of the specific research you just identified?

A Yes, it is dramatically true of that research, in [542] fact.

Q Has the research disclosed whether there are any antecedent conditions which are generally associated with stereotyping?

A Yes, it has, and this is particularly a place where the laboratory research and the field research are very much in agreement. One of the major antecedents for stereotyping, for judgments based on stereotypes is a situation I would call rarity within a particular level of an organization. If a person who is a member of a social group is dramatically underrepresented, they are very likely to be perceived, stereotypically, say, 15 to 22 percent.

THE COURT: You are not telling me anything. You have got to talk to a layman, ma'am. You have got to talk to a layman. You are not talking to one of your colleagues and so I have got to understand what you are saying, you understand.

THE WITNESS: Can I try again on that one?

THE COURT: You sure can. You go right ahead and try again.

THE WITNESS: What I'd like to do is talk about some of the factors in a particular organization and particular setting that would tend to encourage stereotyping, and one of the factors is that if there are very, very few people, say very, very few blacks or very, very few women or very, very [543] few men within a particular level of an organization those people are very much likely to be thought about in terms of their category, in terms of their race or in terms of their sex.

BY MR. HURON:

Q Now, what does that mean, say, for women, if there are few women and so a lot of people in the organization think of Miss Jones as a woman as opposed to a manager, what does that mean?

A Well, to the extent that stereotypes are negative expectations that are held about people as a result of categorizing them, if you categorize a person as a woman rather than a manager, to the extent that the stereotype doesn't fit what people want in a manager or to the extent that the expectations about the person overwhelm information about the person per se, then it is going to be stereotypic and detrimental.

Q Is there in the literature a general document on stereotyping, say, a woman, does research indicate that such a thing exists?

A There is. There are general stereotypes of what people particularly expect men to be like and typically expect women to be like. People typically expect women to be strong on the social dimensions. Women are generally expected to be more tender and understanding and concerned about their people, and soft.

[544] THE COURT: You say that of people who have dealt with women expect that? People who have dealt with women in the business context expect that or are you talking about people out on the farm?



THE WITNESS: Well, I would—

THE COURT: I mean we have got to talk about people dealing with people in a business context. Does that lady have an opinion that she is going to offer in this case?

MR. HURON: Yes, sir.

THE COURT: Why doesn't she give me her opinion? And then tell me what she bases it on.

MR. HURON: Fine. We were trying to—

THE COURT: And if we did that then I think I would have a better understanding of where you are getting.

BY MR. HURON:

Q Dr. Fiske, have you examined whether stereotyping was occurring at Price Waterhouse; I am talking about sex role stereotyping, at the time and in connection with Ann Hopkins' proposal for partnership which began in August '82 until she was placed on hold in March of 1983?

A I have examined evidence relative to that.

Q Have you formed an opinion as to whether or not stereotyping was occurring?

A Yes, I have.

Q And what is your opinion?

[545] A I am confident that stereotyping played a role in the decision about Ann Hopkins.

THE COURT: Well, now, what kind of role and how confident? Are you able to say that you are confident within a reasonable degree of certainty in your discipline?

THE WITNESS: Yes, I would say so, given—

THE COURT: All right. That is what I want to know. And then you said it played some part. What part? I don't know how you would express it in your discipline percentage-wise or how you would express it, but minor, major, middle? I don't know what the terminology is.

THE WITNESS: Well, in lay language I would say it played a major determining role.

THE COURT: A major determining role, with reasonable certainty?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. HURON:

Q Dr. Fiske, I think probably what it would make sense to do here is to just go directly into the basis for your opinion, looking first at—summarizing briefly, what the antecedent conditions are and then what the indicators are in this case.

A Okay.

Q So I think a few minutes ago we were talking about [546] the antecedent conditions and you mentioned one was rarity, is that right?

A Yes, if a person is a part of an unusual category they are more likely to be perceived in terms of that category.

Q And what about in this case, is there evidence in this case that speaks to that particular issue?

A Yes, I think there is very striking evidence in this particular case, given that Ann Hopkins was one of 88 people being proposed for partner at that time. She was the only woman, which makes it extremely likely that she would be perceived in terms of her gender and, secondly, the very, very small number of female partners at Price Waterhouse, I believe it is 7 out of 662, that would—those factors would tend to make being female extremely salient in that setting.

Q Now, Dr. Fiske, when you say it is likely that Miss Hopkins would be perceived as a woman, do you mean by everybody in the organization?

THE COURT: Well, I would have thought she would have been. There is a picture of her sent to every partner. They knew she was a woman. There wasn't any question of her sex. They knew she was a woman. Of course she was perceived as a woman.

THE WITNESS: Could I clarify it?

[547] THE COURT: Yes. I am trying to get at what you were saying. I am sure she was perceived as a woman. I take it what you are saying is because she was in a minority, an extreme minority from your point of view, that this group of men out there perceived her in a certain way and stereotyped her. How? I mean how did they stereotype her? Is that what you are trying to tell me?

THE WITNESS: Well, I am trying to say—yes, that is essentially what I am trying to say.

THE COURT: Well, how did it affect her chances? That is what we are talking about.

THE WITNESS: Well, to explain this it is helpful, if I could, to take just a moment to—if I could take just a moment to summarize very briefly what the typical stereotype for men and for women is, knowing nothing else about a person, and as you were saying out on the farm what do people think and obviously it is more complicated than that.

THE COURT: I am sure it is.

THE WITNESS: But if you take as background that the overall typical stereotype for feminine behavior is to be socially concerned and understanding, soft and tender and the overall typical stereotype for a man, all other things being equal, is that they will be competitive, ambitious, aggressive, independent and active, what that means is—now, that is—you can get people to—the research shows [548] that if you ask people what are men typically like, what are women typically like for the past 40 or 50 years they have recorded those kinds of traits. Now, what that means is that when a person, male or female, behaves in ways that are incongruent with that typical expectation that is very salient to people.

And so if a woman behaves in a way that is, in quotes, masculine, if she behaves in a competitive, ambitious, aggressive, independent and active way, that the research shows that she is often likely to be perceived as being,

especially on the social dimension, as being unfeminine on the social dimension as being not especially understanding, not especially concerned with other people and so on.

THE COURT: Are you saying that there is research that shows that that type of stereotyping occurs in a business in today's business context?

THE WITNESS: Yes.

BY MR. HURON:

Q Could you mention some of the research, Doctor?

THE COURT: In other words, that in organizations you are saying like IBM, like Price Waterhouse, like General Foods or just to name some of the large corporations, that that exists and that men doing business with women expect women to be tender and suppliant and meek and courteous and sweet in those companies? I just—I find it difficult to [549] believe and therefore I want to know is there any research, because it is a new idea to me.

THE WITNESS: Well, what the research shows—Professor Cantor's research is a particularly good example of this. What her research shows is that given this overall generalized expectation that, what she calls solo or token women in an organization, in other words women who are rare within their level in an organization are especially likely to be perceived in female stereotypical roles.

For example, they are especially likely to be perceived as motherly or as sort of harmless mascots but a woman who behaves in a stereotypic way is very likely to be perceived in what Professor Cantor calls an iron maiden role, what you may think of as a shrew. Someone who is hard, unemotional, difficult to get along with. Not a regular human being.

THE COURT: Then you are viewing this as a token case, somebody put a woman in just because they want a woman, as they put a black or a homosexual or any of these different groups. Just put them in there so you would recognize them.



THE WITNESS: I don't actually mean to imply that when I say token, the terminology in my field is to call somebody who is rare or unusual a token, but obviously that implies that they are there for token reasons.

THE COURT: Well, token has a very bad connotation [550] in the field that I am working in, has an extraordinarily bad connotation. Are you suggesting that that is what this is, a token case?

THE WITNESS: No, absolutely not. No. It would probably be better to use rarities as a term or somebody who is a solo or close to a solo, has close to solo status within an organization.

BY MR. HURON:

Q Now, Dr. Fiske, to follow up a little bit, when you suggest or say that stereotyping may occur under certain situations are you saying that everyone in the organization is going to buy off on that stereotype?

A No, I am not saying that.

Q Okay.

A What I am suggesting is that there are certain antecedent conditions that should alert one to the possibility of stereotyping. And that when there are very, very few members of a particular group in an organization they're very vulnerable to being stereotyped and in this particular case when I started to look at the evidence related to it one of the other things that I was alerted to was the fact that criteria on which people are evaluated are very ambiguous and the information to which those criteria are matched are always quite ambiguous, the more ambiguous the criteria and the more ambiguous information the more room there is for selective [551] perception and I am an expert in selective perception.

Q Now, let's go through that, back up and go through it in terms of—a few steps in terms of the actual evidence. When you say there is ambiguity of criteria in this case, what is it you are referring to?

A Well, having looked at the long and short form instructions and at the partnership criteria that are outlined and also at Paul Goodstat's speech about partnership, some of the criteria, some of the task-related criteria are not ambiguous, they talk about the amount of money one brings into the organization for example. That is a very objective criterion. If you talk on the other hand about people's personality traits or, quote, having an excellent reputation or, quote outstanding attributes, or comparing someone, as it says on the long and short form instructions, to, quote, comparable individuals, I would submit that those are rather vague criteria.

Q Are you saying, Dr. Fiske, that there is something wrong with using criteria like that in making a decision?

A There is nothing wrong with using subjective criteria. I just think you have to be extremely careful in the use of them. Because there is room for misperception.

Q Now, what about—you mentioned also another antecedent condition. I believe it was ambiguity of information. Is there evidence in this case that that type of [552] ambiguity exists?

A Yes, I think so. A lot of the comments are based on the briefest of encounters with the candidate.

THE COURT: Well, let me put this to you and see if I can understand—I am trying to understand this. I take it a person who is stereo—subject to this stereotype flaw doesn't know it himself. It isn't conscious.

THE WITNESS: You mean the stereotyper?

THE COURT: The person stereotyped, the male.

THE WITNESS: Okay, the person who is stereotyping?

THE COURT: I don't know what you call it, but the person that you say is the stereotype, he doesn't intentionally know he is, does he?

THE WITNESS: It seems unlikely to me in this day and age given the amount of general knowledge there is about affirmative action and equal employment opportunity and so on, it would seem unlikely to me that a person could be totally unaware of what they were doing.



THE COURT: All right. And if that male who has voted, you know, in a partnership was aware that he was reacting to stereotype your view would be that he ought to disclose that or ought to be uncovered before his vote was counted?

THE WITNESS: Yes, and I also think it is possible for somebody to have a stereotype and to be thinking [553] stereotypically but say wait a minute, I'd better not act on this.

THE COURT: Well, now, take a partner who is supervising the plaintiff. And she asks for his advice and he gives it to her. And she comes back, having not reacted very strongly to counsel with respect to how she should conduct herself. She tells him that his advice was stupid. And she busts into his room without knocking when the door is closed, frequently. How does that man know what it is that is reacting to him? It isn't abnormal to react adversely to that. Well, you are stupid. To the partner. You are stupid. You gave me terrible advice and of course I don't particularly respect your status and I bust in on you when I please, when I am the person that has to be heard.

Now, what are you trying to tell me about that, that under those facts his vote should not be counted or that he is discriminating sexually?

THE WITNESS: No, I am not trying to say that. What I am trying to suggest is that there are several potential indicators that stereotyping is going on and that if you find several of them occurring in a given setting then that gives you a stronger inference, divergent, if you will, that stereotyping is operating. Any given incident like that frequently has an external explanation but when you see a pattern of evidence that indicates that several indicators of [554] stereotyping are present then that leads one to a stronger inference.

THE COURT: What are the indicators in this case, from your study of the material, that you find?

THE WITNESS: Well, there are several that stood out to me. One of them in particular, one of the major indicators of categorical thinking, which leads to stereotyping, is trying to maximize the differences between two groups of people, say males and females, and minimizing the difference within a particular group, so in other words, advising a woman to behave more like a woman and less like a man is a way for people to reinforce their categories.

You know, you are not allowed to behave that way because that is too masculine. So there is a lot of research showing that people when they categorize, you know, maximize differences—

THE COURT: Let me take that up with you. This is very important to me and I am not disagreeing with you, I am trying to understand. If one says that in the context that, now, we are going to expose you. I am for you as a partner. The man talking to you that says to behave more like a woman. I am for you. I am trying to get you to be a partner. But you are going out to the mid-west and you asked me how I ought to behave and I think you ought to put a little sugar on your tongue. Now, you can view that two ways. You can say he is [555] stereotyped. That man is against women. Or you could view it I am for this lady. She needs a little help. This is a conglomerate bunch of very different kinds of people and my advice to you is you have got to put a little sugar on your tongue.

Now, what do you draw from that? Is that man sexually biased or should all the people in the office who he thinks need to have a little sugar on their tongue to get along with others be fired, or what are we talking about in terms of real life?

THE WITNESS: I think there are two things relevant to that. One is—

THE COURT: Do you follow what I am getting at?

THE WITNESS: Yes, I do. I am trying to phrase it coherently.

THE COURT: Take your time.

THE WITNESS: One thing that was striking to me in looking at the evidence for this case was that Ann Hopkins was reported to do extremely well with the clients.

THE COURT: Yes.

THE WITNESS: The clients seemed to have respected her enormously, to have wanted to retain her services over other people, so it seemed clear to me that advice to her about her behavior was not so relevant to her success with her clients. It had more to do with office politics, if you [556] will.

THE COURT: Right.

THE WITNESS: Given that particular advice that was given about her behavior was to behave more like a stereotypic woman it goes beyond you ought to put sugar on your tongue because you are going to hurt our business because the clients wouldn't like you if you are not sweet. So this is only one of several indicators, you understand.

THE COURT: Is there not a stereotype of a person who is sugar and cream with their equals and their superiors and quite different with the people who work for them, doesn't the research show that?

THE WITNESS: I don't know of a stereotype that is that detailed.

THE COURT: That is not a common experience shown by your research?

THE WITNESS: I won't deny that it may exist, but I will say that the research that I know doesn't document that.

BY MR. HURON:

Q Dr. Fiske, perhaps it would be helpful to focus on whether you are concentrating on individuals or a group dynamic here exactly how your analysis is perceived.

A The level of analysis that I look at is the level of analysis of the organization and the organizational cli-

mate, the environment that exists there and the various indicators [557] that is so in this case are all indicators of an organizational climate in which stereotyping is not discouraged.

Q Now, you mentioned one indicator was maximizing the difference between groups and I believe you alluded to Mr. Beyer's advice to miss Hopkins to—

A Categorical thinking.

Q Yes, dress more feminine and so forth. What are some of the other indicators and what is the evidence for them in this case?

A Well, another indicator of stereotyping is biased attention to stereotypic dimensions.

Q What does that mean?

A Well, you notice that the dimensions that I mentioned, you know, with regard to men and women, for example, there is a social dimension that has typically seemed to be the province of women and a task dimension that typically seems to be the province of men.

Given that the majority of the comments regarding Miss Hopkins were related to her social skills or perceived lack of social skills but they were not comments by and large that were related to irrelevant dimensions like stereotypically relevant dimensions like honesty and integrity. Honesty and integrity are not part of either the male or female sexual stereotype so the focus of the comments were on the kinds of personal traits that are related to sex role [558] stereotyping.

Q Okay. So your analysis then is based in part on the long form and short form comments, is that what you are talking about?

THE COURT: I take it you are talking about the negative comments or do you say it is stereotyped to always praise a woman and say she is one of the outstanding people, because that is what they all say.



BY MR. HURON:

Q How does that break down, Dr. Fiske?

A Well, there seems to me to be a very interesting case of selective perception going on here. When I looked at the ways the two different groups of people described the very same behavior, it was striking to me that her supporters described her behavior as, on the long and short forms, outspoken, sells her own ability, independent, courage of her convictions, stamina. All attributes that you would think of as positive.

However, these are counter-stereotypic for a woman. They are what you want in a manager in fact and so for a woman to be a manager she has to behave or is likely to—one particular rule is to behave in a sex role in incongruent ways, to be independent, aggressive and so on. Now, that very same independent, aggressive behavior was positively evaluated by her supporters but her detractors or the people who voted [559] hold or insufficient or no on her described that very same behavior as overbearing and arrogant and abrasive and running over people, so to me that is a warning sign that there is selective perception going on.

The very same behavior—behavior is ambiguous enough that it can be perceived in more than one way.

THE COURT: Sure.

THE WITNESS: And given that her non-supporters were perceiving this sex role incongruent behavior in negative ways, behavior that in a man would be—typically might be considered to be more adaptive because it is congruent with being a manager to be ambitious and aggressive and so on. It fits extremely well with the research literature that I know that says there is a penalty for behaving in sex role incongruent ways and that people who do that are disliked.

BY MR. HURON:

Q Not disliked by everybody obviously.

A Not by everybody but by people who are acting on stereotypes.

Q Are there other indicators such as—are there other indicators?

A Yes, there are some other indicators. Another clue for me or cue, I should say, was the intensity of the negative reaction. The literature on stereotyping of people who are rare in organizations indicates that the negativity of the [560] response becomes disproportionately negative. That somebody who is being seen in terms of a stereotype will be seen in intensely negative ways and it seemed to me that some of the comments by the non-supporters were rather remarkably negative. Disliked by virtually everybody she knows. But that clearly wasn't true, because there were other staff people who were saying positive things. She is very tough-minded and no nonsense and I can get along with her. So the non-supporters were seeing her in a real black and white kind of light and that is a consistent indicator of stereotyping, especially in these rarity type of cases.

Q Dr. Fiske, if I could ask you here, just in common everyday terms, what does it hurt that this stereotyping is going on? What is happening?

A Well, when people are perceiving somebody in terms of a stereotype they are doing two things that are unfair to the individual. One is that they are not perceiving them as an individual. That they are perceiving them in terms of their group, which is unfair to the individual involved. The other thing that happens is—

Q How is it unfair? That is what I want to get at.

A Well, it is unfair specifically because the process of stereotyping accentuates the negative and discounts the positive. I mean everybody has good and bad features.

THE COURT: Are you aware that these comments were [561] not taken at face value, that people went out and personally talked to the negative reactors to find out the basis, to find out what their experience was, to see whether or not—and as far as one man said, he didn't want any women, he couldn't stand any women. So there was an effort.



I am not trying to say how skillful it was or—they certainly weren't psychologists, they were prospective partners, but at least there was an effort to go out and not just take this typing as automatically so, an effort to find out what lay behind it, what caused it, what the basis of it was. Some kind of an effort.

THE WITNESS: It seemed to—well, there are two things. In a specific way related to this particular case, it seemed to me that there was a selective search for the negative to some extent, that there was—it is in the research literature. It is notorious that when people have an expectation they tend to confirm it. They go out and look for evidence and they think they are being unbiased sometimes but if you point out to them, you know, you have to look at both kinds of information, both information that disputes what you think and information that supports what you think, then people can make a better effort to do that.

But people are notoriously biased and inaccurate when they have a hypothesis about a person and then seek information to see whether or not that hypothesis was true.

[562] THE COURT: So this was all decided ahead of time and they just went out to confirm it is what you think happened?

THE WITNESS: Well, I think there is a tendency in that direction.

THE COURT: You think there is a tendency and—

BY MR. HURON:

Q Dr. Fiske, I think you commented now on, as I count, three indicators of stereotyping, that is maximizing the differences between sexes, the acting on it, what you call it, the stereotypic dimension, the intensity of the comments, the negative comments. You have mentioned also the issue of rarity, does that tie into any of those in any way?

THE COURT: The issue of what?

MR. HURON: Rarity.

THE COURT: I don't know what this is.

BY MR. HURON:

Q Well, could you explain what you mean by that?

A The research on what happens to people who are solos or rare within their organization—

THE COURT: I understand what that is, yes.

THE WITNESS: This especially shows that people have very intense and often quite negative reactions to them, the reactions to them are overly negative. More negative than they are to the very same behavior coming from a person [563] in a fully integrated situation and there is research, much of it that controls for the actual behavior, they take the very same behavior and compare it in a solo situation or close to solo situation with a fully integrated situation.

BY MR. HURON:

Q And again, did you find that condition, if you will, present in this case?

A Yes, I did.

\* \* \*

[564]

Afternoon Session  
1:50 P.M.

THE COURT: All right, sir.

BY MR. HURON:

Q Dr. Fiske, you have testified as to your belief that stereotyping was occurring in this situation, but I'd like to know what does this mean to Ann Hopkins, in your view?

A It is my opinion that there was stereotyping occurring in this organization and that it was negative stereotyping and that its effect on Ann Hopkins' evalua-

tion was to accentuate the negative because of her sex and that in this particular setting the decision was based on a few very intensely negative votes that were profoundly influenced by stereotyping, sexual stereotyping in particular, and that in effect she was blocked by a few people who were reacting to her on the basis of stereotypes.

THE COURT: And you realize, or I suppose you realize the key vote that blocked her ultimately was by a man who had been for her? You understand that?

THE WITNESS: What occasion are you referring to?

THE COURT: The man who had been for her on the first round and who had supported her proposal at—when she didn't seem to him to have developed any particular change and he began to hear some additional facts about her and then he had the incidents I told you about her a minute ago, [565] criticizing his advice and busting into his office and all that. He voted the other way but he was for her originally. Is he a stereotype? You see what I am talking about? He wasn't bitten by the stereotype bug originally, though he worked with her, he knew her very well.

THE WITNESS: Well, it is my observation that some of the people in this situation—many of the negative votes were based on stereotypes, it seems to me, based on the content of what those people said which was stereotypic in nature and they were also voting negatively on her. There were also some people who said things that could be interpreted as reflecting their stereotypes, that did not vote negatively on her.

It seems to me those people were in effect overriding their stereotypes and saying even though I don't like her behavior I am still going to vote for her. I think it is also possible to go the other way, to have somebody perceive that other people are reacting very negatively and then to withdraw support on that basis.

THE COURT: You say when it is possible. You mean research in the field of stereotype leaves you with a

sense of certainty about that? Everything is possible?

THE WITNESS: I understand that. I think that in a situation—the research indicates that in organizations which do not present people with incentives for not acting [566] on their stereotypes, the stereotyping is more likely to occur. I think that is the case in this organization. It is striking to me that there was no policy prohibiting stereotyping on the basis of sex, that some of the partnership criteria discuss age, they discuss health but they do not discuss sex or race. Nor did I see any other indication of the evidence that I reviewed that discouraged people from stereotyping based on sex, and so in that organizational climate the norm is not to discourage the stereotype person, it seems to me, and that is something the research indicates.

BY MR. HURON:

Q Dr. Fiske, as, I guess, a footnote to your testimony, is there any research which documents any correlation between or with respect to individuals who hold a particularly deferential view towards hierarchy and those who tend to engage in stereotypes?

A Some of the oldest research in stereotyping indicates that people who are very concerned with hierarchy, who are either concerned that other people—especially concerned that other people be deferential to them are also extremely deferential to people above them in the hierarchy, are especially likely to be stereotypers, to be people who engage in stereotyping.

MR. HURON: One moment, your honor.

Nothing further, your honor. Thank you.

[567]

Cross-Examination

BY MR. TALLENT:

Q Professor Fiske, what materials did you examine as the basis for the formulation of the opinions that you have expressed in your direct testimony?



A I examined the text of the long and short forms on Ann Hopkins. I examined the reports of the office visit on her behalf. The admissions committee report. The policy board notes on Ann Hopkins. I also looked at the long and short form instructions and the criteria for partnership and Paul Goodstat's speech on what it takes to be a partner at Price Waterhouse. I looked at portions of Mr. Beyer's deposition.

Q What portions of Mr. Beyer's deposition?

A I scanned large parts of it. I can say that I looked at the parts in which he talked about counseling her in particular.

Q Were you directed to those parts or did you find them on your own?

A I frankly don't recall.

Q All right. Anything else?

A And I have seen some of the defendant's exhibits related to partner-candidates.

Q What exhibits?

A Which exhibits? I have looked at some of the [568] exhibits related to other women who were proposed and other men who were proposed and the comments that were made about them.

Q As to the other women who were proposed, do you recall who you looked at?

A There was a notebook, I don't remember the exact number, there was a notebook that had approximately six or eight women listed in it and I looked through that notebook.

Q And as to other men?

A There were about three notebooks full of men.

THE COURT: You looked at all those notebooks?

THE WITNESS: I didn't have time to read them all cover to cover, but I did look at some of them to see what the comments were like.

BY MR. TALLENT:

Q How long did you look at the notebooks?

A I believe I spent a couple of hours on that.

Q A couple of hours on the women or a couple of hours in total, in aggregate?

A Two or three hours total.

Q Two or three hours total. How much time have you spent in preparation for this testimony, in total, leaving travel time aside?

A I haven't added it up. Probably on the order of 20 hours, something like that, of specifically looking over [569] the evidence specifically related to this case and going back to the research literature that is particularly relevant to this case.

Q When did you first meet Ann Hopkins?

A Today.

Q Who else have you discussed this case with?

A I have discussed it with Mr. Huron and Mr. Heller. That is it in terms of direct discussions.

Q You looked—you especially read the deposition of Mr. Beyer?

A Yes.

Q And did you form any professional conclusions with respect to Mr. Beyer on reading this deposition?

A It seemed to me that Mr. Beyer was counseling her to behave more like a woman and less like a man in a stereotypic sense.

Q Did you draw any conclusions from that with respect to what Mr. Beyer's actions in that regard had on her candidacy for partnership?

A The level of analysis at which I draw conclusions about stereotyping is whether stereotyping is occurring within an organization. I do not try to identify particular individuals as stereotypers or not stereotypers.

Q So you have no professional conclusion with respect to Mr. Beyer.

[570] A. I wouldn't say that.

Q What is your professional conclusion?

A I would say that his counseling of her particularly given that it was intended to reflect the opinion of his partners as to the ways in which she could improve her



chances was a representative of what the organization preferred. He was acting on behalf of the organization, was my reading of it.

Q Well, now, let's suppose—you are an expert on stereotyping. Let's suppose you were going to give a woman advice in an organization where you suspected that perhaps some of the actors in the organization or actresses could be the victim of the stereotype bug. Would it be good advice or bad advice to say behave the way they want you to behave, those awful stereotypes?

A I think there is a double bind for women who are professional women, managers, for example. If you tell them to behave in ways that are sex role stereotypic, that is, not to be too aggressive, not to be too competitive, to be dedicated and supportive of other people but not to go out too much on their own, then they are seen as incompetent managers.

THE COURT: Well, where is that advice in this case? Did anybody tell this woman not to be competitive?

THE WITNESS: No, no, I am just describing—he [571] asked—

THE COURT: I have been sitting all week and I haven't seen the slightest evidence that anybody told her not to be competitive. They were encouraging her on her competitiveness and said to win the business.

THE WITNESS: I said there was a double bind. One of them, if you counsel somebody to behave in feminine ways, the other is to counsel someone to behave in ways that are not stereotypical ways, but I would warrant her that this would have a cost, that women who are aggressive, behave in aggressive, independent ways are perceived to have a lack of social skills and what I would tell her is to work in a department that has a substantial number of women in it.

BY MR. TALLENT:

Q A department of the organization. Let's address this rarity. Where did you get this evidence of rarity?

A The research suggests that people who are—

Q Excuse me, I am not directing to the research. I said where did you get the evidence of rarity in this case?

A From my understanding that there are an extreme minority of women partners and that she was the only woman proposed that year for partner out of 88-odd candidates.

Q All right. Let's deal with the environment in which she operated and let's take you to your environment. Would you describe women as rare in the following factual [572] situation? That 30 percent of the assistant professors at Tufts are women, that 35 percent of the associate professors at Tufts are women but that 5 percent of the full professors are women, would you describe that as women being in a rarity condition at Tufts in that particular department?

A Are you talking in a particular department those are the statistics?

Q Yes. Let's take a particular department or the whole university.

A Well, it makes a difference. The rarity phenomenon or the extreme minority phenomenon pertains to a particular department within an organization and at a particular level so, for example, having a lot of female secretaries is irrelevant. That doesn't help.

Q How about female professors now? An associate position. Professors?

A What I can speak to about that is that to the extent that being a tenured female professor is an extremely unusual phenomenon. Then when women come up for tenure they are one of the very few people who have been considered at that point and they stand out by virtue of that.

Q Isn't that the same condition of rarity as if there were 5 percent women in the whole of the faculty?

A No.

Q The condition is considerably diluted, is it not, [573] by the large number of women in my hypothetical?

A Excuse me, did you say diluted?

Q Diluted. The condition of rarity is diluted. I am a little unfamiliar with this terminology so if I blow it, forgive me.

A It is somewhat diluted but the major is the level to which the person is aspiring.

THE COURT: You understand that if this organization that we have in front of me now said, well, there is some stereotypes around here so all the women have to work together, I would have more lawsuits. You just said a moment ago that what you would do is you would put her in a position where she worked with other women. And I take it then I would have many more lawsuits because every woman that had that happen to her would say it was a sexual bias.

THE WITNESS: I am sorry. Perhaps I didn't put it clearly enough. What the research literature indicates and I think common sense indicates too, is that if you have a critical mass of women in a particular department and the research literature indicates above 15 or 20 percent at a particular level then these effects are really undercut quite a lot and so if you are only going to have 5 women in an organization it is better—it is not good to have a woman's department because then the department becomes stereotyped as a women's department and the department becomes undesirable. And the research indicates that. But if you can cluster [574] people then these effects don't occur so much. Batch hiring is what the—and batch promotion is what the researchers in this area suggest.

BY MR. TALLENT:

Q You don't have many lawyers researching this area do you?

A Lawyers researching the area? Not that I know of.

Q Let me understand this a little better. Your conclusion that stereotyping is working adversely to Miss Hopkins is based in large part on the comments that she received from the various partners who commented on their exposure to her, is that correct?

A I believe that it is based on the same evidence that the admissions committee used.

THE COURT: That is the comments, the long and short form?

THE WITNESS: Yes.

BY MR. TALLENT:

Q All right. I direct the witness's attention to defendant's Exhibit 27.

THE COURT: May I have defendant's 27.

MR. HURON: The same information as in plaintiff's 21. I think it may be organized differently.

MR. TALLENT: It is ordered differently, so that causes some confusion. Well, all right, by name, the [575] commentator's name is on the right-hand margin.

THE COURT: You can handle it that way even though the exhibits are a little different. The text is the same, I take it.

BY MR. TALLENT:

Q We have a number of comments here. Would you identify those for men that demonstrate to you that stereotyping is going on?

A Well, there were—one of the indicators that I discussed was the pattern, and I will describe who contributes to that pattern but the pattern that people who were not in favor of her were interpreting this independent, assertive behavior as a liability. Some examples of that are, for example, Mr. Statland on page 2006—

MR. TALLENT: 2006. Yes?

THE WITNESS: Saying she is potentially dangerous. Making—Mr. Coffey who at that time was not in favor of her although I know that later he—



BY MR. TALLENT:

Q Let me stop right there with Mr. Statland. Are you familiar—did whoever gave you this exhibit tell you that the comments that were considered to be positive comments by the organization are the ones that are set out to the margin? The comments that are believed to be negative or in the negative side are indented?

[576] Okay? Now, Mr. Statland's first comment that she is aggressive, bold, and mesmerizing of clients and partners. Which side of the stereotype that you just described to me, described to the court, does that fit in?

A He is focusing on stereotype-relevant dimensions, that is clear. He is not focusing on her performance per se. Her ability to retain clients.

Q Do you know who Mr. Statland is? Did anybody tell you who he is and what his role is in the firm?

A Yes.

Q What is it?

A Well, my understanding is that he is, for example, the person who made the speeches on the—

Q That was Mr. Goodstat.

A Oh, sorry, sorry. You are right. There were 6 partners who filled out long forms on her. He is one of the people who did that.

Q Yes. What does he do in the firm is what I am trying to get. What you understood about his comments.

A I am not sure precisely what he does in the firm.

Q Suppose I told you that he is the firm's technical expert on electronic data processing, is it stereotypical of Mr. Statland to say this woman doesn't know anything, has little substance, in his opinion, and therefore might be dangerous, is that stereotypical, in your view?

[577] A The conclusions that I draw are based on a pattern of indicators of cross-people. In any given instance I think it is possible to come up with an alternative explanation for that particular person but my considered judgment is that a pattern of comments that is

related to her counter-stereotypic behavior is based on stereotype, stereotyping.

THE COURT: You see, you have got some laymen here who are trying to understand. We are not questioning your sincerity. But is it, for instance, stereotyped for him to say, and apparently that is part of what you are looking at, that she will bend to clients' demands too easily? Is that a stereotype comment by a man about a woman?

THE WITNESS: In the context of Ann Hopkins, I would say it seems unlikely because most people didn't view her as somebody who bent to people's demands easily.

THE COURT: So though he says she is aggressive, bold, and mesmerizing of clients and partners you took that to be a sexist remark when he said she did bend to clients too easily?

THE WITNESS: I didn't take that as a sexist remark. What I am—my understanding is that in that particular firm viewing somebody as aggressive and bold is a positive way to view them and it is task related.

THE COURT: Yes. And they gave her favorable marks.

[578] THE WITNESS: On that.

THE COURT: But that isn't stereotyped. You would say—I thought I understood your testimony to be that if someone was that way they'd be negative about her.

THE WITNESS: My testimony is based on a reading of a pattern of negative comments that are stereotyped relevant such that viewing her as overbearing and arrogant and abrasive and running over people is a way to interpret assertive and ambitious and aggressive behavior but to put it in a negative light.

BY MR. TALLENT:

Q But that isn't what Mr. Statland says, is it?

A Mr. Statland says—I am not trying to say that somebody who is stereotyping is incapable of having any-



thing positive to say and in his context to say that she is aggressive, bold and mesmerizing and writes and speaks well, commands authority, is a positive thing to say.

I think that whoever wrote the comments—whoever typed the comments could not have believed that little substance and potentially dangerous is a positive thing to say.

BY MR. TALLENT:

Q I think that is indicated by the intention but the comments that he is construing as favorable to Miss Hopkins are anti-stereotypical, are they not, professor?

[579] A That is precisely my point. My point is that nobody disagrees that she doesn't behave like a typical woman. I would submit that the people who view that as adaptive behavior in that organization and as a good way to get promoted are not acting on stereotypes. The people who view that as abrasive and obnoxious are people who don't like it when women behave that way.

Q So Mr. Statland's a cross? He thought it was good behavior but didn't recommend her for the partnership.

A It appears that way.

Q Is it stereotypical—are men and women viewed differently with respect to this substantive knowledge?

A They can be except in cases where there is overwhelming, very specific objective task-related evidence to the contrary.

Q All right. Now, let me ask you something generally about this business of stereotyping. You have relied heavily on Professor Condon's study, is that it?

A Cantor.

Q Cantor? Professor Cantor was studying what?

A Professor Cantor wrote a book called "Men and Women of the Organization," and she studied a large northeastern organization. In particular she was focusing on the managerial level.

Q What kind of organization?

[580] A It was a large industrial supply organization in the northeast with 50,000 employees.

Q How many managerial types?

A Hundreds. I can't quote you exactly how many.

Q It was an industrial concern?

A But with a large managerial sales staff.

Q Are these stereotypes that you deal with in the research, are they demographically sensitive?

A Could you explain what you mean?

Q Sure. That is to say, do people with Ph.D's react differently or likely to react differently than people with high school educations or rich people likely to react differently than poor people or people in the west likely to react differently than people in the east, people in the south than in the north? Is there a generational gap? All of the demographic characteristics of the audience. Or are stereotypes really stereotypical?

A The content of the typical man, typical woman stereotype is surprisingly constant across years and types of people and so on. There are specific male and female subcategories like being motherly or being a shrew, which also show up across all different kinds of demographic conditions. The expression of those stereotypes is responsive to people's educational level.

Q Responsive to people's educational level?

[581] A Yes.

Q And how does educational level impact on stereotypes?

A Well, people are less—people are more sophisticated the more educated they are, typically, generally speaking.

Q Stereotypically speaking.

A Less likely to be—no, I am not saying stereotypically actually. I am generalizing. Just from a common sense point of view even. People are less likely to be blatant about it if they know it is not something they are supposed to be doing.

Q From a common sense point of view?

A Yes.

Q And is it your stereotype that the more educated people have more common sense?

A No, I didn't say that. I think that it is very likely that people who are more educated are less likely to be blatant in their expression of their stereotypes.

Q Did you do any demographic study of Price Waterhouse, particularly the partner ranks, to determine how it should fit into the research?

A No, I didn't, but it seemed very representative and the research comes from a broad range of evidence.

Q Broad range of evidence. None of them were large public accounting firms?

[582] A Not specifically accounting firms.

Q None of them were large professional organizations like law firms, I suppose?

A Well, actually some of the evidence—some of the research evidence does use professional decisions about people, decisions to promote people to manager, decisions at a professional level.

Q Are you talking about the recognized professions? By that I mean those for which there is specialized training and licenses?

A Yes.

Q But it is sensitive to education, is that correct?

A The expression of stereotypes is sensitive to education.

Q Did you do any study here, numerical study to correlate the negative votes, if you will, with respect to Ann Hopkins in the expression of stereotypical remarks?

A I did not do a numerical study but I took a piece of paper and listed on one side the comments—the comments related to stereotypes for people who voted for her and people who voted against her and it was overwhelming to me.

Q Do you have that piece of paper?

A Well, I have got excerpts from it here which I have read already.

THE COURT: Well, we started to get examples of what [583] you thought were stereotypes and it would help me, I think, if we can do that in some reasonable way without necessarily being comprehensive but—

THE WITNESS: Let me—

BY MR. TALLENT:

Q You had just mentioned Mr. Statland and you were moving to Mr. Coffey when I backed you up there, so let's talk about Mr. Coffey's comments.

A Mr. Coffey's at a time when he voted hold on her although later to the contrary came in, as I understand it, and changed his mind, said, "she is just plain rough on people. Our staff does not enjoy working for her. There is a risk she may abuse authority."

Q Now, fit that, if you would for us, into your stereotype structure.

A Well, for example, the comment that she may abuse authority, it seems to me that is a rather extreme comment in light of the general types of comments that people are making about her in general and also looking at some of the other comments about partner candidates. It is comments like that saying she is potentially dangerous, saying she is—Mr. Everett said she was, quote, universally disliked, for example. Those are very strong comments to make and it is my understanding that she was not universally disliked.

Q From what did you get that understanding?

[584] A From reading other people's comments which said nobody left, who say that the staff wanted her recommendations, some of them, when they left. There was one person, you know, who said she was difficult but he wanted her recommendation. He respected her, quite clearly.

What I am suggesting is that when you see a few individuals' comments who are disproportionately negative although they are talking about the very same behavior that everybody agrees exists, which is a very independent,



assertive person, that they are exaggerating the negative, which is a sign of stereotype.

Q All right. Who else besides Mr. Coffey?

THE COURT: And that would lead them also to exaggerate the positive?

THE WITNESS: Not necessarily—

THE COURT: They've made the most extraordinarily positive statement about this woman that I have ever seen in a document of this kind. No one is her equal. She has got more brains than all the rest of us, and does the stereotype make them say those favorable things?

THE WITNESS: The difference I think is that the realms in which they say positive things about her are areas in which the criteria are much less ambiguous. They are talking about job performance types of things. Does she—

THE COURT: Well, dealing with people is part of [585] your job.

THE WITNESS: Of course it is, and my understanding is that she did rather well dealing with clients and she did well dealing with many partners and many staff but there are some partners who objected to her behavior.

THE COURT: And because they didn't like her they are stereotypes? You see, there is a personality factor here. Two people can look at the same person, two males, and one of them likes her and the other one not.

THE WITNESS: Sure.

THE COURT: And maybe they just generally didn't like her.

THE WITNESS: Well, the reason that I think it is not just general dislike and that it is stereotypic is because there is this convergence of these indicators of trying to get her to be more feminine, that the comments are all on stereotypic personality trait dimensions and not on things like integrity and sincerity. That the comments, some of them, are really rather extreme. Remarkably intense.

BY MR. TALLENT:

Q Professor, I have a little trouble with vocabulary here. I apologize for it. Would you describe for me the convergence between the comments of Mr. Beyer and the negative comments that you see elsewhere? How does that nexus or convergence occur, professionally speaking, of course?

[586] A Mr. Beyer, for example, says, "she sells her own ability." Okay? That is obviously in that particular context a positive thing to be able to do. One wants to be able to sell one's ability to a client so they hire you. One could also see that as arrogant, if one wanted to interpret it differently.

Q I am not seeing the convergence between the negative in Mr. Beyer's comments.

A When I am talking about convergence I am saying that across the people who were non-supporters of her there is a negative theme that runs through that. There is a negative interpretation of this assertive, independent behavior and that seeing that on sex role relevant dimensions alerts me to the possibility of sex role stereotyping, combining that with antecedent conditions like somebody who is in an extreme minority in an evaluation situation that is fraught with ambiguity alerts me to the possibility that there is stereotyping going on. The convergence that I see is that two different groups of people are evaluating the same behavior very differently and that the ones who are evaluating it negatively are—fit very closely to people's negative evaluations of counter-stereotypical behavior.

Q Let's look at Mr. Warder's comments. He is next.

A I wouldn't say that that is one of the stronger pieces of evidence.

[587] Q Is it a piece of evidence at all, professor?

A It is ambiguous. "A few rough spots" is not a particularly strong negative.

Q And the first sentence you would read as being strongly positive, I take it?



A That is true. That is not inconsistent with what I was saying though about counter-stereotypic behavior. She may be recognized on a task dimension as being very competent but perceived as socially abrasive.

Q Mr. Warder's comment in your view is stereotypically neutral, is that fair?

A It is somewhat more neutral than some of the other ones I would single out.

Q Then I must repeat my question. What is it about—how do the words "rough spots," and I take it that is all you rely on, fit into the stereotypical literature, and I'd like a specific reference to the literature at this point.

A That particular comment is not strong evidence that fits into the stereotypical literature.

Q Okay. All right. Let's look at Mr. Beyer's comments. How do they fit into the literature?

A Mr. Beyer was a supporter of hers and I am arguing that on the whole, on the average the supporters were viewing her behavior in light of her job performance and its relevance to the goal of being a partner.

[588] Q All right. How about—so is Mr. Beyer's comments stereotypically neutral or counter-stereotypical, or how is it?

A It is not informative.

Q Not informative. Okay. How about Mr. Epelbaum's comment? I am sorry, 2005.

A Oh, okay. Mr. Epelbaum is a complicated situation because he is somebody who changed his mind about her and so it is not clear to me whether he was a supporter or a non-supporter.

THE COURT: He ended up being opposed to her.

THE WITNESS: Yes. So in this particular case he is voting yes for her. On the other hand, he is using all the same terms that the people who voted no all along used. He is talking about her as abrasive, unduly harsh, difficult and so on.

# BY MR. TALLENT:

Q I am a little troubled. In your experience, professor, are there abrasive women?

A It is certainly possible, sure.

Q There are. Have you met them?

A Yes.

Q Are there mean women?

A Yes.

Q Are there arrogant women?

[589] A What I am suggesting is that—

Q Let me finish.

A Okay.

Q Are there arrogant women?

A Yes.

Q Women who are just plain rude?

A Yes.

Q Now, if I run across one of these women and I comment that she is just plain rude, what must I do to insure that my own reactions are not springing from some deep-seated stereotype that I am carrying around in my bosom?

A Well, if you say she is the rudest person you ever met you should pay attention to what she said. Because she is unlikely the rudest person you ever met. When people say extreme statements like that, they should be re-examining the basis for those statements.

Q How about one of the ruder persons, rudest persons I have ever met?

A That is a pretty extreme statement, too.

Q Extremely rude.

A That is an extreme statement, too.

Q Very rude? But there are such people.

A Well, there must be.

Q There must be. If there must be such people—you see, I have on the one hand data that I think I am taking in [590] and I am processing it through my head and trying to say something about it. What do I have to do

to this head in order to process that data non-stereotypically?

THE COURT: Perhaps this helps. Pardon me for interrupting. You have testified that in your professional opinion stereotypes played a major determining role in her rejection as a partner and that you say so with reasonable certainty. Well, then, you see, that requires an analysis of whether that—of what that opinion is based on, acknowledging for example—perhaps that there may be in all these documentations some stereotype remarks, one, two, three. There is certainly one gentleman that everybody laughed at was so stereotyped that nobody would pay attention to it.

Now, the question is an attempt is being made to identify what you are relying on to see if there is support for your view that it played a major determining role, with professional certainty, which is what you state. Do you follow what I am—

THE WITNESS: Yes, I am sure you're—

THE COURT: And that is what we need to get at.

THE WITNESS: Could I clarify it a little bit?

THE COURT: Oh, certainly, but I wanted just to indicate why this is getting to the specific because that is the only way your opinion can be tested in this kind of bizarre atmosphere that we are in here in this courtroom.

[591] THE WITNESS: Let me read a list of adjectives that were used by people who voted against her. Mr. Green said that she was "overbearing." Mr. Haller said that she was "arrogant." Mr. Haller also said that she was "self-centered." Mr. Hart and Mr. Blythe said that she was "abrasive." Mr. Coffey, when he was voting against her said that she "runs over people." Mr. Hoffman said "she implies she knows more than anyone in the world about anything and is not afraid to let anybody know it." Statland says "she is disliked" and Mr. Statland said, "she is potentially dangerous."

That is a pattern of extreme negative comments that contrasts remarkably in my mind with a pattern of posi-

tive comments about what is clearly the same behavior, Mr. Krulwich who said she was "outspoken." Mr. Beyer who said, "she sells her own ability." Mr. Loenis saying "she has a will to get things done." Mr. Powell saying "she is independent." Mr. Powell again saying "she has the courage of her convictions." Mr. MacVeagh "she is authoritative and formidable."

Mr. Hoffman saying "there is no question about who is the leader, no nonsense kind of person." I see a very striking contrast in the way the very same behavior gets framed. And I am an experimental scientist, what we do frequently is take the very same behavior and put it in a situation in which the antecedents encourage people to stereotype.

[592] THE COURT: You notice, however, that this organization anticipated that, in having each of these individuals compare this particular candidate to all the other candidates in the last four or five years.

THE WITNESS: In the instruction for the long and short forms?

THE COURT: In the statistical analysis. Now, wasn't that one way to try to get at that rather than—you see what I mean, adjectives are used by different people sometimes differently but there is a difference clearly in what you point out but then they ask these people not to stop there. They said looking at this person, with respect to these various qualities how do you rank this person in relation to the people you have been thinking of for the last five or six years? Did you follow what those rankings were?

THE WITNESS: Are you talking about the numerical part of the forms that they fill out at the end where they circle numbers and so on?

THE COURT: Yes.

THE WITNESS: If you look at the traits descriptions of her it is very interesting to me that the two traits on which she is less positively evaluated than all the other ones are, I think it is sensitivity and tact is one and



tolerance is the other. Now, if you work blindfolded to show that to somebody who studies sex role stereotypes and [593] say what are women supposed to be more than anything in all these traits, tactful and sensitive and tolerant, okay? Simply because they are circling numbers on a scale doesn't mean that they are being more objective. They are still judging personality traits.

BY MR. TALLENT:

Q So if I said there was evidence in this case that some of the very people who called Ann Hopkins arrogant had called men arrogant, described men candidates as arrogant and had voted against them as well, what would you say was going on? Suppose I said that the evidence is overwhelming? I will just represent it to you, the evidence is overwhelming that Price Waterhouse partners do not like people who they perceive as arrogant or overbearing.

THE COURT: Male or female.

MR. TALLENT: Male or female.

THE WITNESS: I wouldn't have any argument with that. What I am suggesting are two things, one is having the criticisms of her personally be a sufficient basis for rejecting her makes me suspicious. And in some of the cases where I looked at where men were called arrogant the admissions committee report said that given that this person has no major redeeming skills or technical competence this personality trait is a problem so in those cases the personality trait was not in and of itself a sufficient basis for rejection. [594] So that is one thing.

BY MR. TALLENT:

Q Did you sample that in any scientific way that I can take an empirical number to see if you had a scientific basis for that?

A I looked through the exhibits, the notebooks and looked at the front page that has the admissions committee report.

Q Did you count them?

A No, I didn't.

Q You testified on direct examination that there are two forms of accepted method in your particular trade. One of them was surveying and the other was laboratory research. Which was this study?

A This study was neither one. It was based on my knowledge of the research literature and the extent to which the situation fits it. I didn't get a chance to finish—

Q Did you take a hypothesis to the data here?

A No, in fact I did not.

THE COURT: Why don't you let her finish her other answer and then you can go ahead?

MR. TALLENT: I am sorry.

THE WITNESS: The other part of my answer was that I wouldn't call it stereotyping to talk about men as arrogant because it is not a counter-stereotypic behavior for men to [595] be ambitious and assertive. It is for a woman to be. So calling a man arrogant is not stereotypic.

THE COURT: But you don't draw any significance from the fact that the men call a man arrogant and then they don't take him in the partnership, that perhaps they are interested in having non-arrogant partners?

A Oh, I am sure they are interested in having non-arrogant partners. But it was my understanding at any rate that the men I looked at who were called arrogant were also incompetent in other dimensions.

THE COURT: So you don't put any weight on that. I can understand why. If they are incompetent it doesn't make any difference if they are arrogant or not.

THE WITNESS: It wasn't the major determining factor.

BY MR. TALLENT:

Q And your sample was of how many?

A I don't count them, frankly.



Q Your professional conclusions here are not reached then on any empirical basis?

A I am an expert in observing behavior and at drawing conclusions from written documents. The kinds of data that we get from our subjects are frequently written descriptions of other people. That is precisely what these are.

Q And you don't try to get any empirical base so you [596] have a statistical significant sample.

A This—you don't need to have a sample in this particular case because I have the entire population of comments that were made about her.

Q But you don't have the entire population if you haven't studied the entire population of comments made about men to find out whether this is affecting her as a woman.

A I compared it to the comments made about men.

Q Some men.

A Some men. Not every single man that was ever considered, no.

Q Did you look at all 90—89 candidates for this year?

A I looked at a large proportion of them.

Q Of what proportion, professor?

A 20 or 30.

Q 20 or 30. Well, I am still struggling a little bit with this notion about when a comment is stereotypical and when it is not. Some of these folks describe Miss Hopkins, as you have read back to me, as overbearing, arrogant, self-centered, abrasive, thinks she knows more than anyone in the universe, and potentially dangerous. Would you think it would be somehow a stereotypical decision to exclude such a person from the partnership, if that was in fact true?

A I am not qualified to say whether or not it is true. [597] Q Okay.

A Because I didn't observe her behavior, I am not here to speak to that.

Q So you haven't observed her behavior but you have concluded that in making the particular observation of her behavior that Mr. Green who describes her as overbearing was somehow behaving in a stereotypical fashion? How can you do that?

A I can do it because there is research showing that women who behave in counter-stereotypic ways are frequently disliked for that. And that very same behavior coming from a man is not disliked.

Q Do you know Mr. Green to know whether he evaluates data that way?

A My testimony is based on a pattern of indicators. I do not know Mr. Green.

Q And the pattern of indicators here is that in your words that many of the people who she came in contact with characterized her that way?

A Some of them did.

Q Does that suggest that maybe she at times showed those characteristics or does that simply in your professional opinion, professor, show that they are reacting to some stereotypical bug that has bitten?

A In my selective opinion people selectively perceive [598] behavior.

Q All people do that?

A Behavior is ambiguous. It is open to multiple interpretations. When those interpretations are directly in line with a stereotype, that suggests that it is being selectively perceived and stereotypically.

THE COURT: One of the aspects of this that I am thinking about, the people that were against her used stronger adjectives than the people who were for her in describing the same conduct. That doesn't necessarily—all these people were—are debating with each other. Some of them are trying to sell. Some of them are trying to block. So if somebody taking all the different factors into account as against her and using stronger adjectives to sell the negative position does it necessarily follow,

according to the research, that that position is stereotyped or does it follow that they are just against that person?

Do you follow what I mean? We all tend to use stronger language to get our point of view across.

THE WITNESS: Well, what is striking to me is that the people who were for her certainly were using very strong positives and many of the people who were against her were also using strong positives about her task performance, per se, her ability to work with clients and so on. When her supporters are describing her in her personal behavior [599] they are not using extreme statements, they are using fairly moderate statements.

THE COURT: They are noting it but they are downplaying it, aren't they? Or they are putting a different flavor on it.

THE WITNESS: Yes. That certainly seems that way to me.

THE COURT: And the people who are against her are putting a more negative flavor on the same thing maybe.

THE WITNESS: That kind of extreme negative is very typical of situations where you have got a very small minority being evaluated. Maybe it would help to explain why that is? Maybe not.

THE COURT: Well, if counsel wish.

BY MR. TALLENT:

Q Well, I am a little concerned with this notion of very strong minority. I understand Miss Hopkins was one of—was the only partner—candidate in this particular year. What did you—how many women professionals do you—were you told that Price Waterhouse hired or had working at Miss Hopkins' same level in the Office of Government Services in Washington, D.C. when all of this happened? What percentage of those folks were women?

A That is not really the relevant question from my point of view.

[600] Q Do you know the number?

A I do not know that.

Q Did you ask the question?

A I did not ask it because it wasn't relevant.

Q It wasn't relevant?

A No, what is relevant is the pool from which she is being selected and the job to which she aspires.

THE COURT: Well, that is the pool that she is selected from.

THE WITNESS: Well, the partnership pool that year, as I understand it, had 88 people in it. She was the only woman.

BY MR. TALLENT:

Q But the people that she was competing with to get proposed was these other people, this pool of senior managers, full of women.

A I don't know how full of it it was.

Q 35, 40 percent to give you a number.

MR. HURON: Objection, your Honor, that is contrary—looking at—plaintiff's Exhibit 38-B sets forth what the pool is that year and that is our estimation of the pool which is larger than the defendant's estimation. 21.

BY MR. TALLENT:

Q In the Office of Government Services on July 1, 1982 Professor, the pool of women senior managers according [601] to Exhibit 67 is 25 percent, in 1983 it is 32.7 percent, the year prior, July 1, 1981 it is 23 percent. The year prior to that it was 33 percent.

A But they are not all being proposed for partner that year. Some of them are expected to be proposed for partner two or three years down the road so they are not really in the same pool.

Q They are all in the pool being considered?

A A senior manager who's only been on the job for a year is not in the partnership pool.



Q From what do you derive that?

A My understanding is that people have to be in the firm for 6 or 7 years oftentimes and that the pool of people who are actually being considered for partner, of which she was a part of this process, was—were those 88.

Q Well, I was talking about the proposal pool in OGS.

A I would have to see the statistics on how long they had been there and how reasonable it was to expect them to be proposed for a partner in that particular year.

Q And what would that mean?

A It would enable me to see whether the people who might reasonably have been expected to be proposed that year was really 35 percent female. It seems to me bizarre that it could have been 30 percent female and only one out of [602] 88 made it to the proposal stage. 30, not 35.

Q Out of the Office of Government Services she was 33 percent of the proposals.

THE COURT: She was 1 out of 3.

BY MR. TALLENT:

Q One out of 3, would that help you a little?

A I think those numbers are too small to treat in a statistical fashion. Three people. The pool that the admissions committee was dealing with is the pool of 88.

Q No. I was looking at a different issue in the case and that is the pool because most of the really important observations here of her occur—are in her competition in the pool in the Office of Government Services.

A I don't necessarily agree with that.

Q On what basis do you disagree, Doctor?

A The 6 people who wrote long forms on her were essentially colleagues who worked with her in her capacity in the Office of Government Services.

Q No, ma'am. That is contrary to the evidence, but go ahead.

A Okay. I misunderstood you.

Q What other basis do you have for it?

A I am making—I am making a strong suggestion that the relevant pool is the pool of people whose application forms were in the pool at the same time hers was. [603] Q For at least the 1983 partnership decision, is that right?

A Yes.

Q The Court asked you a set of questions at the end of your direct examination with respect to Mr. Epelbaum's position in the matter, pointing out to you that he had changed his position over time. And it was your suggestion—in fact you said that the research indicates that people such as Epelbaum are greatly subject to being—reversing their positions—

A I don't believe I said that.

THE COURT: You said where there was negative atmosphere, people would change their position in order to join the negative crowd and that was stereotyped.

THE WITNESS: Well, I believe people are open to conformity pressures, especially if they are ambivalent to begin with.

BY MR. TALLENT:

Q Your statement was that that was indicated in the research. Now, I want to know what research.

A The research on conformity indicates that to the extent that people's judgments are ambiguous or ambivalent they are more likely subject to conformity pressures. He indicates that he thinks she has some good points and some bad points which indicates that he has an ambiguous impression [604] of her and therefore would be more open to conformity pressures. I am not sure that that—certainly that that is what is going on in this case, but that certainly fits.

Q And how would such—how does the research again indicate that such a person should react? Is it the hierarchical situation that that kind of person is in, would that be a pressure on him to change?



A It certainly is possible that if somebody—explain what you mean by the hierarchical situation.

Q Well, if he knew that his boss was a strong supporter, for example, of Miss Hopkins and was going to be mad as the dickens at him if he changed his view, which way would that pressure cut?

A That pressure would cut in favor of his being positive. However, if there was pressure showing that a large group of other people were not in favor, then that pressure would cut the other way.

Q So it would have to be a large group of people in order to—

A Or people he perceived to be potential allies, which was a position he was inclined toward.

Q Do you have any other—I guess you have given us enough. You primarily reacted to these adjectives that you have given me, overbearing, arrogant, self-centered, abrasive, believes she knows more than anybody else. That is what you [605] are relying on?

A No, that is only one of several indicators.

Q What's the other indicators?

A Some of the other indicators that I discussed were the tendency toward categorical thinking, which to me is indicated by counseling sessions that—not only by Mr. Beyer but by Mr. Epelbaum and Mr. Laughlin as well.

Q Let's set those counseling sessions in some kind of context. You have a—you are generalizing, I take it, about a firm's behavior based on conversations that in a career span of 5 or 6 years maybe lasted, I don't know, two minutes? Two minutes out of 5 years? Would you think that was—you have got that in that context, that these were very short conversations.

A It is my understanding that these conversations were designed to give people performance feedback and were rather more significant than just any random two-minute conversation.

Q I am suggesting—in fact the record is that some of those conversations took an hour and a half and I am

suggesting to you that that two minutes of that hour and a half was devoted to the subject of wearing a little jewelry.

A My understanding was that, and we can look back to it if you like, that the counseling sessions were not simply—that the counseling of her to be more feminine was not simply [606] wear more jewelry, but it was also soften your image, tone yourself down, don't walk so stridently, don't wear such masculine clothing, pay more attention to your appearance, wear more jewelry.

This is a pattern of comments to her over time that is consistent with the advice to be more feminine, not to be so assertive.

Q Will you show me where you find in the records you looked at that say please don't be so assertive?

A Yes. In the counseling session with Epelbaum in June of '82 he told her that she was being too assertive, that is what I have written in my notes, and to be more tolerant, patient and, in effect, nurturing the staff. He didn't say nurturing.

THE COURT: Do you have any idea what that was based upon? Do you have any idea what that was based upon? That remark by Mr. Epelbaum? He had a group of managers in the company talking about how the job was going, women, men managers, including this plaintiff. He was asking for suggestions on how they ought to proceed. And another woman spoke up and she was told by Miss Hopkins to keep still. It wasn't relevant. So he said, look, we are all trying to work on this. You shouldn't be so assertive. A stereotype?

THE WITNESS: I would suggest that the same behavior coming from a man would be less likely to be focused [607] on as much as a problem.

THE COURT: Well, he probably would have fired a man. I agree with that. If a man had done it, he probably would fire him but other than that I don't understand what you are talking about.

MR. HURON: Your Honor, if I may, I think the record would reflect that—

MR. TALLENT: Excuse me, counsel, are you objecting or what are you doing?

MR. HURON: I wanted to make a point, if I may. I think the record will reflect that at the time of the counseling session in question in June of '82 it was I believe before some of the—

THE COURT: There was one after when they met her.

BY MR. TALLENT:

Q I have a little trouble with the vocabulary here because I get some synonyms, I think they're synonyms. Mr. Epelbaum said that she was, in this session, look at Exhibit 17, "a hard worker, honest, a high degree of integrity and independence. Articulate, decisive, self-confident and very bright." Is that a counter-stereotypical set of attributes?

A Yes.

Q Then he goes on to criterias of improvement and says, "sometimes overly assertive," and there is an indication [608] here that Miss Hopkins agreed with him. Now, how do we fit that agreement into this equation?

A She is an employee who is being counseled—a junior employee who is being counseled as to how to improve her chances for partnership. It is certainly the politic thing to do to listen carefully to the feedback you get and not argue with it.

Q Is that stereotypical or not stereotypical?

A It is office—

Q Just good sense, isn't it?

A It is good sense.

Q So calling the same partner stupid is not good sense, right?

A Probably not.

Q I am still—when you talk about this—I was still looking for this literature that indicates that Mr. Epelbaum was subject to these pressures. You said it was in

the literature and I was anxious for you to cite the literature.

THE COURT: Well, your basic point on that is that people tend to want to conform, either men or women.

THE WITNESS: Yes, that is not sex stereotyping.

THE COURT: It's not sex-related. It is just psychologically so that males and females like to conform.

THE WITNESS: It is possible that he was conforming [609] in the first instance to—

THE COURT: And it only has a sexual aspect if the attitude that he is conforming with is sexual. Wasn't that what you were trying to tell me on that?

THE WITNESS: Yes.

\* \* \* \*

[610] BY MR. TALLENT:

Q In your—in the literature and research on stereotyping, what if—we have explored a little that there is some demographic impact on stereotyping, what impact is there on—or propinquity of a particular possible victim of stereotyping with the stereotyper? I believe that has been the subject of extensive research.

A There is some research on propinquity, yes.

Q What does it indicate with respect to the likelihood of stereotyping?

[611] A Well, the research on contact indicates that contact with a potential victim of stereotyping sometimes undercuts the stereotype but sometimes exaggerates it.

Q Is the extent of contact a factor?

A Not really except that the exaggeration frequently occurs as a result of—in other words, under some very specific circumstances stereotyping can be undercut by contact but under other circumstances extended contact would exaggerate it.

Q Give me an example, and the reference to what those touchstones are.

A Well, for example there is a review in the race relations literature, for example, by a fellow named



Amir, who talks about the conditions under which interracial contact undercuts stereotyping.

THE COURT: Well, I see that every day. Some people believe everybody should be locked up and put in jail, until one of their family is arrested and then with respect to those people they want an exception. That is what you are talking about. That sort of people where they know the person. They understand what is behind the offense.

THE WITNESS: It also depends on whether they stop seeing it as an outgroup and start seeing it as somebody who can be like them.

THE COURT: Yes.

[612] BY MR. TALLENT:

Q Professor, you came to this particular endeavor after being contacted by the plaintiffs, I take it?

A Yes.

Q And the plaintiffs suggested to you that this might be an occasion where your expertise might be used to find some stereotyping, is that correct?

A Yes, that has been suggested to me before too and I have declined to participate.

Q After spending 20 or so hours investigating?

A Not after spending 20 but after spending some time investigating the facts and seeing whether in fact I felt that I could testify on such a case.

Q But you do not think that you engaged in any kind of selective effort here in order to reach the conclusions that you have given this Court?

A No, I don't believe that.

Q Did you review in connection with this—with your effort here any of the presentations or arguments or discussions put on on behalf of Price Waterhouse with respect to the behavior involved in the case?

A I reviewed the information that was available to the decision-makers.

Q All the information?

A Major information that was available to the [613] decision-makers, the long and short forms and the office visits and so on, I believe that I reviewed the balance of the information.

MR. TALLENT: I have no further questions, Your Honor.

## REDIRECT EXAMINATION

BY MR. HURON:

Q Dr. Fiske, at one point in your testimony on cross-examination you were asked some questions about comments on long and short forms and I think you got through some of the comments on long forms. You didn't really get into the short forms. I don't want you to go through all of them, but if we could have some flavor of the—what you found on the short forms, number one, and secondly whether if I—if I were to tell you to make the assumption that Miss Hopkins had been told that it was the short forms that had effectively blocked her candidacy when she was proposed, whether that would be consistent or inconsistent with your analysis.

MR. TALLENT: Your Honor, that is improper redirect and not subject to cross and I think it is a leading question to begin with.

THE COURT: Well, I think it is a proper inquiry. I would have thought it would have been on the direct examination so the other side could deal with it. If you are going to do that I will allow the defendant to come back and [614] take up the short forms one at a time and go through them because I don't think they ought to be mousetrapped by it but I think you should be allowed to fully bring out whatever you want and I say that particularly because I am afraid occasionally I have interrupted because of my interest in this testimony and sometimes diverted counsel from something you may have intended on one side or the other to ask but if you



pursue it I'll have to give counsel for Price Waterhouse another round on that issue.

MR. HURON: Yes, sir, I understand that.

BY MR. HURON:

Q What I'd like to do is talk a little bit about the short forms and your opinion as to their effect on the process.

A Well, to put it in a little bit of context it seems the comments on the short forms are made by people by definition who know her less well and for whom it is based on more episodic types of encounters, not such a long-term contact. That is how the forms are used in any case. They are also more likely to be based on reputation and hearsay, but the specific comments that come out of short forms, if I am understanding your question right, include many of the comments that I have already read.

The comments on the one hand that she was perceived to be overbearing and arrogant and self-centered and abrasive [615] were from people who were filling out short forms and the comments viewing the same behavior in different ways that she had the will to get things done and was independent and had the courage of her convictions are comments also from short forms.

Q Now, there was a fair amount of focus on these evaluations during your cross. Assuming all you had before you, Dr. Fiske, were these evaluations and that was the only indicator that you had of stereotyping, take the long and short form evaluations together, would that be sufficient for you to draw the conclusions you drew?

A Not simply all by itself.

Q What else did you have?

A Well, I drew the conclusion based on rather strong antecedent conditions, having somebody who was in an extreme minority condition, ambiguous criteria and ambiguous information and there seemed to me what I call several converging indicators which included the cate-

gorical things, trying to get her to do things in a more feminine fashion. Charm school. Needs more social grace to overcompensate for being a woman. Those are comments that talk about behavior in light of her gender, her sex specifically. The overly intense negativity and the divided opinion that resulted from that, those are all factors that—all indicators that as a group, you know, contribute to my conclusion about the case.

[616] Q Do you have before you plaintiff's Exhibit No. 17 which is the report of the office visit conducted with respect to Miss Hopkins' candidacy?

A Yes.

Q Could you turn—I think it is the fourth page in or the fifth, the comments of Mr. Epelbaum? You are asked about Mr. Epelbaum's comments on the long form. I am wondering if you could look at his comments that are attributed to him in the office visit.

A Those are the last comments—oh, yes.

Q What is the page reference?

A 3844. He is making some rather extreme statements here. For example, "Ann wants to win. I don't know where she would draw the line." That seems to me like a rather strong innuendo to me and I think it is an example of the kind of extreme statements that are indicative of an extreme stereotype situation.

Q Again, would those extreme statements by themselves be sufficient for you to draw the conclusion that stereotyping is going on?

A No, not one or two by themselves.

THE COURT: And you think it is stereotyped for this man who is a strong partner in the company to say that he himself couldn't have done the job she did? It strikes me that that actually suggests he is given to pretty strong [617] statements on all sides, but he tells his partners that he couldn't do what this woman did. That would impress some people about her, as being favorable.

THE WITNESS: There is this curious split between people's acknowledgment of her superior task performance and getting the job done and getting and retaining clients. I am not suggesting that that is stereotypic judgment, that people are judging her stereotypically when they evaluate her performance.

BY MR. HURON:

Q Are you saying as a general proposition it is more likely for stereotypes to occur when you are looking at personality rather than performance?

A I think that to the extent that that—I think that is true because personality judgments are much more ambiguous. Performance judgments, like the amount of money I bring in is a number. It is a much more—and it is based on much more discrete unambiguous kinds of things.

Q Dr. Fiske, you agree that every person has some balance of positive and negative traits?

A Certainly.

Q And let's assume for the moment that the plaintiff in this case is no different than anyone else in that regard, that she has negative as well as positive traits. What impact does stereotyping have on a person in that situation?

[618] A It has the impact that the person who is acting on the basis of the stereotype exaggerates the negative aspects of the person and tends to discount the positive aspects and in this particular case they are focusing on her personality in doing that.

THE COURT: You don't mean that. Now, think about that answer. You don't mean that. Because if a person fits the stereotype it is an advantage I thought you were saying. I thought you were saying if a person fits the stereotype it was an advantage. In other words, if—if a woman came up to partnership here who was quite feminine and physically attractive and more female and had the other qualities it would be an advantage,

wouldn't it, and she would fit the stereotype.

THE WITNESS: It is an extremely difficult line to walk.

THE COURT: Well, that is why I am pointing out to you it is a little difficult line to walk.

THE WITNESS: I think for a woman coming up for partner or a manager, a high level manager in an organization, it is an extremely difficult—

THE COURT: This place is full of women.

THE WITNESS: Well, in this particular instance rising to the top means being a partner and that seems to be a bright dividing line in this company, being a partner is—

[619] THE COURT: I don't know about that. It's full of prestige, I suppose.

THE WITNESS: Yes. Yes. What I am trying to suggest is that for women who want to—who aspire to the top of their organization, if they follow the route of being stereotypically feminine in their personality they run the risk of being perceived as incompetent so that the research suggests that people discount women's achievements if they can, they are more likely to be attributed, for example, to luck or getting a good break or the task was easy or something like that.

If the woman is incredibly competent—

THE COURT: You are saying a woman can't join a man's organization. There is no way.

THE WITNESS: Well, I am not saying there is no way.

THE COURT: Well, they are going to be the victim of stereotyping no matter what they do, is that what you are saying?

BY MR. HURON:

Q Is that true, Dr. Fiske?

A I am saying that there are two opposing types of tendencies to stereotype. One is a woman who fits—



THE COURT: But they face it either way no matter what.

[620] THE WITNESS: Yes, I just think it is a potential thing that one faces.

BY MR. HURON:

Q Is there something that an organization can do because obviously everybody in the organization is not a stereotyping person, is there something that somebody in the organization can try to do to put some restraints on this?

A It is clear that the organizational environment can discourage people from stereotyping by creating an incentive situation not to do that. To me the fact that there was no policy with regard to sex suggests that the organization was not making an effort to undercut sexual stereotyping. That Mr. Gervasi, who made the rather extreme comment about the women who were coming up, apparently people ignored him, but the fact that he was able to make that almost verbatim same comment two years running and nobody said to him, look that is really not an appropriate thing to say in this context, suggests to me that the organization is not discouraging people from stereotyping.

MR. HURON: I have nothing further.

THE COURT: And how many of them, if you went around, and said, now, I want to be sure you are not stereotyped, would you say well, I am. I am sorry. I changed my mind. How many does the research indicate that do that?

THE WITNESS: Well, the research indicates it is [621] hard to get people to stop doing that but incentives are really required. You can't really tell people not to do it.

## RECROSS-EXAMINATION

BY MR. TALLENT:

Q Professor, what does research indicate that a stated policy that says do not discriminate on account of sex has on the use of stereo—the propensity of one to stereotype? Have you got research, numerical statistical research?

A The research indicates that instructing people not to stereotype is not in and of itself a sufficient condition for preventing them from stereotyping and I think that goes along with common sense as well. That other things are—additional things are required. However, it would seem to me that it is a minimal condition for discouraging stereotyping.

Q All right. Take another look, if you would, at Mr. Epelbaum's comments on the office visit report and since you have made an evaluation of him, which part of those comments do you believe indicate that Mr. Epelbaum is stereotyping Miss Hopkins?

A I have already stated that he is rather—his comment that she doesn't—he doesn't know where she would draw the line is a rather extreme comment to me.

Q The testimony is, I will represent to you, that these are notes that were transcribed by a third person after [622] an hour and a half lunch with Mr. Epelbaum and Mr. Epelbaum has testified both here and in his deposition that he doesn't ever remember saying that. Does that affect your view of Mr. Epelbaum?

MR. HURON: Objection. I think there is a conflict in the testimony and I think that that shouldn't be part of the question there.

THE COURT: If there was something in the testimony, I wasn't aware of it. It wasn't brought to his attention on the stand, but I don't have that in mind.

MR. HURON: Thank you.



BY MR. TALLENT:

Q Does that affect your view of Mr. Epelbaum and the tenor of these comments if that was a misperceived or—people are misperceived all the time. Those were misperceived impressions by this—

A Of course it would.

Q Is there anything else in there that you would view as stereotypical, counterstereotypical?

A Nothing that I wish to discuss.

MR. TALLENT: All right. Thank you.

MR. HURON: Nothing further, Your Honor.

THE COURT: All right, you are excused. Thank you.

\* \* \* \*

SUPREME COURT OF THE UNITED STATES

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No. 87-1167

PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS

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ORDER ALLOWING CERTIORARI

Filed March 7, 1988

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. Justice Stevens took no part in the consideration or decision of this petition.

(11)  
No. 87-1167

**Supreme Court, U.S.**  
**FILED**  
**JUL 6 1988**

**ROBERT F. SPANOL, JR.**  
**CLERK**

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS, RESPONDENT

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On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

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### QUESTION PRESENTED

In this case petitioner Price Waterhouse was held to have violated Title VII of the Civil Rights Act of 1964 because of its decision not to make respondent Hopkins a partner in the firm. Although Price Waterhouse was held to have established a legitimate, nondiscriminatory, nonpretextual reason for that decision, the court of appeals characterized the case as one involving "mixed motives" for the employment decision because the firm's decisionmaking process included some unconscious and unquantifiable measure of impermissible "sex stereotyping." The court of appeals held, 2-1, that in such a "mixed motive" case the plaintiff prevails unless the defendant shows—and shows by clear and convincing evidence—that impermissible bias was not a decisive cause of the employment decision.

The question presented is whether the court of appeals was in error in shifting the burden of persuasion on the issue of intentional discrimination to the defendant, and in defining that burden in accordance with the "clear and convincing" standard, even though the district court found that there existed a legitimate, nondiscriminatory, and nonpretextual reason for the employment decision, and even though there was no showing that discriminatory bias played any causal role in that decision.



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## In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1167

PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS, RESPONDENT

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 825 F.2d 458. The opinion of the district court (Gesell, D.J.) (Pet. App. 40a-62a) is reported at 618 F. Supp. 1109.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 63a-64a) was entered on August 4, 1987, and a petition for rehearing was denied on September 30, 1987 (Pet. App. 65a). On December 11, 1987, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to January 12, 1988, and the petition was filed on that date. The petition was granted on March 7, 1988 (J.A. 83). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

1. *Introduction.* This case raises the question whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 *et seq.*, is violated in cases where the defendant shows that it had a valid, nondiscriminatory reason for the challenged employment decision and the plaintiff fails to show by a preponderance of the evidence that that reason was a pretext and that the employment decision was caused by a discriminatory motive.

A divided panel of the court of appeals (Edwards, J., and Joyce Hens Green, D.J., with Williams, J., dissenting) held that Price Waterhouse violated Title VII when it declined to make respondent, Ann B. Hopkins, a partner in the firm. The court of appeals did not disturb the district court's factual finding that Price Waterhouse had established a legitimate, nondiscriminatory, and non-pretextual basis for its decision not to make Hopkins a partner, but it held that that showing was insufficient to negate liability under Title VII because the process by which Hopkins was considered for partnership may have included some unquantifiable measure of unconscious "sex stereotyping." Even though Hopkins presented no evidence of any individual or collective illicit motivation on the part of any of the persons actually responsible for making the partnership decision at Price Waterhouse, the court of appeals characterized the case as one involving "mixed motives" on the basis of the testimony of an "expert \* \* \* in the field of [sex] stereotyping" (Pet. App. 53a) who purported to see "sex stereotyping" in some of the expressions used about Hopkins by a few individuals (none of them final decision-makers in her case, and all but one of them *supporters* of her partnership bid). It then held that in such "mixed motives" cases (a) the *defendant* employer bears the burden of proving that unlawful bias was not the determinative factor in the challenged employment decision; and (b) that burden must be carried by "*clear and convincing*" evidence.

The court of appeals acknowledged (Pet. App. 22a) that its ruling, that an employer allegedly actuated by "mixed motives" must prove that intentional discrimination was not the determinative factor in its employment decision, represents a departure from this Court's allocation of the burden of proof in Title VII actions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Burdine*, the Court stated that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253. Building on its decision in *McDonnell Douglas*, the Court in *Burdine* established a "division of intermediate evidentiary burdens" designed to resolve the "ultimate question" of intentional discrimination that a plaintiff must prove. 450 U.S. at 253. First, the plaintiff must show by a "preponderance of the evidence a prima facie case of discrimination." *Ibid.* The defendant is then permitted to meet that preliminary showing by "'articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection.'" *Ibid.* (quoting *McDonnell Douglas*, 411 U.S. at 802). If the defendant comes forward with such evidence, as Price Waterhouse did in this case, the plaintiff must then attempt "to demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. Only a plaintiff who makes such a showing by a preponderance of the evidence will have successfully carried her burden of proving that she was "the victim of intentional discrimination." *Ibid.* The imposition of Title VII liability on Price Waterhouse, absent a showing that discrimination was a "but for" cause of the adverse partnership decision, is inconsistent with *Burdine's* allocation to the plaintiff of this ultimate burden of persuasion.

In addition to holding that the defendant in a "mixed motives" case must bear the burden of proving that dis-



crimination was not a "but for" cause of its employment decision, the court of appeals made two other rulings that we challenge. First, the court of appeals erred in characterizing this case as one involving "mixed motives," even though there was no palpable or substantial evidence in the record that discrimination was a decisive causal factor in Hopkins' failure to make partner. Second, the court erred in holding that the employer must negate unlawful bias by the extraordinary standard of "clear and convincing" evidence.

2. *The Partnership Selection Process At Price Waterhouse.* Each year, new partners at Price Waterhouse are selected from among the firm's senior managers. The "elaborate recommendation and review process" whereby new partners are chosen (Pet. App. 41a) begins when partners in local offices of the firm draft a written proposal that a senior manager from their office be considered for partnership. These proposals are circulated to all of the firm's partners, who are invited to comment on candidates by submitting a "long form" evaluation if they have had "significant and recent contact with the candidate" (*ibid.*) or a "short form" evaluation if their contact has been more limited. See Def. Exh. 21, 22, & 23. The evaluation forms ask partners submitting comments to rank each candidate relative to other candidates recently considered for partnership against an "exhaustive list of relevant, neutral criteria," including practice development, technical expertise, interpersonal skills, and participation in civic activities. Pet. App. 41a-42a. The forms also ask the partners to indicate whether they believe the candidate should be granted or denied admission to the partnership, or held over for consideration in a later year, and request a short explanation of the recommendation made. *Ibid.*

The Admissions Committee of the firm's governing Policy Board reviews the entire file of each candidate, including the long and short form evaluations, and inter-

views partners who have submitted comments to learn more about the basis for their views and recommendations. The Admissions Committee, at a series of meetings, then evaluates in depth all of the information on each candidate, and makes a recommendation to the Policy Board. If the Admissions Committee recommends that a particular candidate be rejected or "held," it also prepares a short memorandum summarizing the basis for its recommendation. Pet. App. 42a.

The Policy Board reviews the recommendations of the Admissions Committee and votes to include the candidate on a firm-wide partnership ballot, to "hold" the candidate, or to reject the candidate. Candidates placed on the ballot must be approved by a two-thirds vote of the entire partnership. Candidates whom the Policy Board votes to reject or to "hold" are informed of the reason for the Policy Board's decision.

3. *The District Court's Findings.* In 1982, Hopkins was proposed for admission to the Price Waterhouse partnership by the partners in the Office of Government Services (OGS) in Washington, D.C., where she had been employed as a manager and then a senior manager since 1978. Def. Exh. 20. Thirty-two partners submitted forms evaluating her candidacy. Of these, thirteen recommended that she be admitted to the partnership, eight recommended that she be denied admission, three recommended that she be "held" for consideration in a subsequent year, and another eight stated that they lacked a sufficient basis upon which to make a recommendation. Pet. App. 43a. Many partners made comments about Hopkins' abrasive personality and poor interpersonal skills, noting in particular her impatience, insensitivity, and use of profanity in dealing with staff. *Id.* at 43a-44a. As a result, the Admissions Committee recommended that she be held "at least a year to afford time to demonstrate that she has the personal and leadership qualities required of a partner." *Id.* at 44a (quoting Plf. Exh. 19; Tr. 267-268). The Policy Board adopted the



Admissions Committee's recommendation, and Hopkins was advised of the basis for that decision. Pet. App. 44a.<sup>1</sup>

By the time the annual partnership selection process began again in 1983, two OGS partners had withdrawn their earlier support for Hopkins. Hopkins' advocates within OGS concluded that reconsideration in the 1983 partnership selection cycle would therefore be in vain. Accordingly, Hopkins was advised that OGS would not repropose her for partnership. Although Hopkins was told that she could remain as a senior manager, she resigned from the firm in January 1984. Pet. App. 7a.

Hopkins then initiated this action in the United States District Court for the District of Columbia, claiming that unlawful sex discrimination was the cause of both Price Waterhouse's initial decision to place her partnership candidacy on hold and the subsequent decision of the OGS partners not to repropose her for partnership in the following year. (The latter allegation is not before this Court, because the district court ruled that the deci-

<sup>1</sup> At the time of trial in this case (March 1985), Price Waterhouse had a total of 662 partners, seven of whom were women. Pet. App. 41a, 43a. As of July 1, 1987, Price Waterhouse had a total of 805 partners, 17 of whom were women. Another 93 persons will be admitted to the partnership effective July 1, 1988, seven of whom are women. The district court rejected Hopkins' claim that the allegedly small number of women partners at Price Waterhouse indicated discrimination. The court noted that Hopkins' "proof lacked sufficient data on the number of qualified women available for partnership \* \* \*. Women have only recently entered the accounting and related fields in large numbers and there is evidence that many potential women partners were hired away from Price Waterhouse by clients and rival accounting firms." *Id.* at 50a-51a.

Hopkins was the only woman in her partnership "class" of 88 candidates, the successful members of which became partners effective July 1, 1983. Forty-seven of the 88 candidates were admitted to the partnership, 20 candidates (Hopkins and 19 men) were held for consideration in a later year, and the remaining 21 men were rejected outright. Pet. App. 5a. As these figures show, typically about half of the candidates proposed in any year are admitted to the partnership, and the other half divide between those who are held and those who are rejected.

sion not to repropose Hopkins was not discriminatory (Pet. App. 48a), and Hopkins did not appeal that determination.) In response, Price Waterhouse showed that during her five-year period of employment with the firm Hopkins' abrasive personality and poor interpersonal skills created grave problems, and made it particularly difficult for employees subject to her supervision to work harmoniously with her. The district court accepted this showing, agreeing with Price Waterhouse that Hopkins "had considerable problems dealing with staff and peers." *Id.* at 59a. Indeed, after carefully examining Hopkins' employment history at Price Waterhouse, the district court found that both "[s]upporters and opponents of her candidacy indicated that [Hopkins] was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." *Id.* at 43a-44a. The district court concluded that the complaints about Hopkins' "interpersonal skills were not fabricated as a pretext for discrimination" and that Hopkins' "conduct provided ample justification for the complaints that formed the basis of the Policy Board's decision" that her partnership candidacy should be postponed for at least one year. *Id.* at 46a-47a.

There was overwhelming evidence before the district court to support these findings and conclusions. Hopkins herself testified that she was "abrasive," "candid," and "hard driving" (Tr. 41, 44-45), and characterized herself as "a bitch" during a major project (Tr. 109). Staff who had worked under Hopkins described her behavior in strong terms. One consultant described Hopkins' manner toward him as "abrupt" and "insensitive" (Tr. 363). He testified that "it was tough dealing with Ann and I don't think that I've had that type of same tough experience prior to or after" working for her (Tr. 371). Another employee (who testified *on Hopkins' behalf*) indicated that "it required 'diplomacy, patience and guts' to work with her" (Pet. App. 46a, quoting Tr. 434). And one consultant actually quit the firm in part because he could not tolerate working with her (Tr. 193-194),

citing an incident in which Hopkins had screamed obscenities at him for 45 minutes (Tr. 193).

There was evidence too that Hopkins had a "condescending attitude[]" toward the staff assigned to her projects (Tr. 351). Working for her was "demeaning at times" (Tr. 363), and one consultant testified that he felt Hopkins "looked down upon" him (Tr. 364). Some staff members called Hopkins "Queen Ann" because of her "regal bearing" toward them (Tr. 164). Hopkins gave a particularly clear indication of the low regard she had for the employees working under her when, during a lunch with some partners in 1981, she launched a vitriolic attack on staff members. This so angered the partners present that they cut the lunch short. The incident was described by OGS partner Thomas Beyer, Hopkins' strongest supporter in the firm:

Ann and I and Lew Krulwich, one of our partners, \* \* \* went off to lunch together. \* \* \* [A]nd we were eating and just kind of passing time as our lunch—and something happened to Ann. I wasn't quite sure what. But she began to—began to criticize a number of the people in the office at different levels. In different fashions. At first I passed it off thinking well, this is, this is Ann. She's probably tired. I couldn't—I really didn't have much regard for it. But Ann kept up with it. Lew was silent and—not saying anything and Ann kept on talking \* \* \*. And it got more vitriolic. More striking. And after awhile I began to get quite angry \* \* \*. At that point, Lew, kind of trying to settle the situation, said, look, let's quit and go back to work. We walked back in silence and I went off to my office still quite angry that Ann had done this.

Tr. 197-197A. Later that afternoon, Beyer told Hopkins that "you're making it extremely difficult for me if you keep this up to try to develop an image, an awareness that you are in fact a fine partner candidate in the firm. How do I convey that message to the partners in the firm when you have outbursts like this, unprovoked as far as I can tell, and certainly questionable." Tr. 198.

Hopkins' handling of staff work assignments also reflected insensitivity and lack of concern for subordinates. Her management style was one of "perpetual crisis," and if she could not convince the staff that there was a crisis, "she [would] go out and create one" (Tr. 327-328). She created "chaos" among staff (Tr. 364) by assigning "unstructured, almost trial and error" tasks (Def. Exh. 25;<sup>2</sup> see also Tr. 273), giving so little direction that the work would have to be done over and over again (Tr. 364-365). The staff "resented [Hopkins'] relationship with them" (Tr. 164), and became "frustrat[ed]" (Tr. 365) and "somewhat alienated" (Tr. 367; see also Def. Exh. 31).

Though Hopkins by most accounts had good technical skills and was accepted by clients once they "adjusted to her hard driving style and no-nonsense approach" (as her most enthusiastic supporter put it) (Def. Exh. 9), her abrupt and abrasive manner and her insensitivity and condescension toward employees caused problems throughout her tenure at Price Waterhouse. Beyer, the partner in charge of OGS, testified that he heard complaints about her relations with staff almost from the day he transferred from the Boston office to OGS in 1979. Tr. 163-164. Consistently, in evaluations of her work and in formal counseling sessions, partners detailed problems in the way Hopkins dealt with staff and urged her to correct those problems. As the district court found, Hopkins "[a]t the time \* \* \* indicated that she agreed with many of these criticisms" (Pet. App. 46a). The evidence showed that she nevertheless continued to be abrasive and difficult to work for.

An annual performance review of Hopkins' work during 1979-80 stated that in order to enhance her "partnership potential, [Hopkins] must improve her interpersonal

<sup>2</sup> We are lodging with the Court copies of Defendant's Exhibits 7, 9, 11, 13, 14, 15, 17, 24, 25, 27, 30, 31, and 37 and Plaintiff's Exhibits 12, 13, 14, 15, 17 (last two pages), and 37. These exhibits contain handwritten notes and other material that could not be reproduced in the Joint Appendix.



skills" (Def. Exh. 7). This theme recurred repeatedly in evaluations of Hopkins' work. Her deficiencies with respect to "relationships within the office" were the "primary focus," for example, of her 1981 counseling session (Def. Exh. 11). During that session, the importance of interpersonal skills in the evaluation of candidates for partnership was emphasized, and Hopkins agreed that it was important that she make progress in that area (*ibid.*). Nonetheless, Hopkins was told at her 1982 counseling session that she remained "overly assertive," intolerant, impatient, and insensitive to staff development (Def. Exh. 17); and in various reports on her work made during 1982, partners stated that Hopkins was "overly critical" (Def. Exh. 14), needed to become "more sensitive to others" (Def. Exh. 24), and needed to "demonstrate people skills" (Def. Exh. 25). Following Hopkins' work on a project in Price Waterhouse's St. Louis office, one partner there wrote that "[d]ealing effectively and motivationally with staff is Ann's primary apparent weakness," and "the one area where Ann needs to show improvement to become a partner" (*ibid.*). Another partner was moved to report that Hopkins approached the St. Louis project as if it were a "fire drill" and "alienated almost everyone who worked on [it]" (Def. Exh. 31). As a consequence, "[n]o one want[ed] to work with her" in the future (*ibid.*).

This substantial history of severely strained relations with staff was a major focus of the comments made about Hopkins by partners who completed long or short form evaluations when she was considered as a partnership candidate. These negative comments were not limited to partners who opposed her candidacy. One of her early supporters, OGS partner Donald Epelbaum, wrote that Hopkins could "be abrasive, unduly harsh, difficult to work with &, as a result, cause[d] significant turmoil" (Def. Exh. 27), while other supporters commented that she was "a 'tough cookie'" (*ibid.*, Hart) who was "somewhat lacking in the congeniality dept." (*ibid.*, Powell), and who "drives too hard" and "lose[s] sensitivity for

staff" (*ibid.*, Beyer). Moreover, even those partners who considered their contacts with Hopkins insufficient to make a judgment as to whether she should become a partner were able to comment on her interpersonal skills, showing that this problem pervaded Hopkins' entire situation at Price Waterhouse. These partners, although they had less frequent contact with Hopkins, reported that in their experience she was "weak in interpersonal skills" (*ibid.*, Johnson), "arrogan[t] & self-centered" (*ibid.*, Haller), "abrasive" (*ibid.*, Hartz), and "extremely overbearing" (*ibid.*, Green).

Among those who did not favor making Hopkins a partner, one partner had concluded that she was "potentially dangerous" (Def. Exh. 27, Statland), and another (who later changed his mind and supported Hopkins) thought she had shown herself capable of "abus[ing] authority" if she were to become a partner (*ibid.*, Coffey). Others making "no" or "hold" recommendations noted that Hopkins was "universally disliked" by staff (*ibid.*, Everett), who did not want to work for her (*ibid.*, Fridley, Statland, and Coffey), and that she was "consistently annoying and irritating" (*ibid.*, Hoffman), "unpleasant" (*ibid.*, Whelan), and "very abrasive" (*ibid.*, Blythe).

The evidence outlined above demonstrates that, far from being generated by sexist biases, these comments were simply accurate reports about Hopkins. That is why the district court found that these complaints were justified by the evidence. The central question about Hopkins' suitability for partnership at Price Waterhouse was epitomized by the partner who asked whether her "personality [would] limit her ability to successfully market work, retain staff & maintain satisfactory relations with her [partners]" (Def. Exh. 27, Hartz). The evidence provides ample support for the Policy Board's reservations.

In addition to finding that Hopkins' behavior provided good grounds for the various negative comments made in the partnership evaluation forms, the district court also



rejected Hopkins' attempt, based on a comparison of her file with those of similarly situated men, to show that Price Waterhouse treated her differently from male candidates with overly aggressive or abrasive personalities. At the same time, however, the district court believed that some of the negative characterizations about Hopkins' foul language, arrogance, and impatience—*e.g.*, that she needed to take a "course at charm school" (Def. Exh. 27, Hoffman)—reflected "unconscious" (Pet. App. 54a) but "discriminatory [sex] stereotyp[ing]." *Id.* at 57a. Still, the district court balanced this evidence against the record of acknowledged "deficiencies" in Hopkins' performance (*id.* at 46a). At the end of the day, the district court found, Hopkins had proven only that sex stereotyping "played an *undefined* role in blocking [her] admission to the partnership." *Id.* at 54a (emphasis added). Because of this inconclusive showing by Hopkins, the district court found,

the Court cannot say that [Hopkins] would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations.

*Id.* at 59a.

The district court thus found that Hopkins had not shown that discrimination by Price Waterhouse *caused* the harm she was suing to redress: the evidence did not establish that she would have made partner even in the absence of any sexual stereotyping or that such conduct was actually a motivating factor in Price Waterhouse's decision. Indeed, the district court did not find even "unconscious" stereotyping on the part of any person at Price Waterhouse responsible for actually making the relevant decision about Hopkins.

Nevertheless, the district court found that Title VII was violated. The violation was deemed to arise from the confluence of three factors, none of which the court thought was discriminatory standing alone. First, "[c]omments influenced"—albeit unconsciously—"by sex stereotypes were made by partners." Second,

the firm's evaluation process gave substantial weight to these comments; and [third,] the partnership failed to address the conspicuous problem of stereotyping in partnership evaluations. While these three factors might have been innocent alone, they combined to produce discrimination in the case of this plaintiff.

Pet. App. 58a. In short, Price Waterhouse was found liable because, "[d]espite the fact that the comments on women candidates often suggested that the male evaluators may have been influenced by a sex bias, the Policy Board never addressed the problem." *Id.* at 55a.

The defendant's liability was thus *not* predicated upon an employment decision shown to have been made on the basis of gender; the district court did not find that discrimination caused Hopkins' rejection. Rather, Price Waterhouse was found to have committed an intentional violation of Title VII because it failed to counteract the unconscious sexism that Hopkins' expert read into the colloquialisms of some of Hopkins' colleagues—none of them the ultimate decisionmakers—who had commented on her performance in the course of the evaluation process.

The district court's imposition of liability, notwithstanding its failure to find that Hopkins' rejection was caused by discrimination, is particularly troubling because of the way in which the existence of even "unconscious" sex stereotyping was divined. The district court's insight into these unconscious elements of Price Waterhouse's partnership decisionmaking process came primarily from the testimony of Dr. Susan Fiske, described by the district court as "a well qualified expert" in the "field of stereotyping." Pet. App. 53a. Although Dr. Fiske had never met Hopkins, and made no inquiry whatever into the *facts* of Hopkins' actual performance at Price Waterhouse, her review of the written comments made by Price Waterhouse partners about Hopkins' performance enabled her to opine that the partners' negative statements about Hopkins were caused by sexual

stereotypes rather than the reality that they accurately described. Dr. Fiske purported to find sex stereotyping in comments that Hopkins was "overbearing," "arrogant," "self-centered," and "abrasive," and that Hopkins "r[an] over people" and was disliked by staff (J.A. 60). Dr. Fiske reached this conclusion by simply *excluding* from her consideration the actual evidence of Hopkins' behavior, evidence that persuaded even the district court that Hopkins' "conduct provided ample justification for the complaints" about her. Pet. App. 46a-47a. Here is a typical exchange:

Q. \* \* \* Some of these folks describe Miss Hopkins, as you have read back to me, as overbearing, arrogant, self-centered, abrasive, thinks she knows more than anyone in the universe, and potentially dangerous. Would you think it would be somehow a stereotypical decision to exclude such a person from the partnership if that was in fact true?

A. I am not qualified to say whether or not it is true \* \* \* [b]ecause I didn't observe her behavior.

J.A. 64.

As Judge Williams, dissenting below, observed, Dr. Fiske's approach means that "if an observer characterized someone as 'overbearing and arrogant and abrasive and running over people,' an expert such as Dr. Fiske could discern \* \* \* that [those comments] stemmed from unconscious stereotypes \* \* \* without meeting the subject of the comment or making any inquiry into a possible factual basis." Pet. App. 36a. Further, Dr. Fiske found forbidden motives even in the comments of partners who *supported* Hopkins' partnership bid, testifying that their favorable comments were efforts "to overcome their stereotypical attitudes." *Id.* at 13a n.3 (citing Tr. 565 (J.A. 42)). It seems clear, therefore, that on this approach "no woman could be overbearing, arrogant or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to

a woman on such attributes." Pet. App. 36a (Williams, J., dissenting).

4. *The Court Of Appeals' Decision.* A divided panel of the court of appeals affirmed the district court's finding of liability as well as the theory upon which it was based. The court expressly recognized that the causation issue was at the center of the case. Noting the split among the circuits as to where the burden of proof should be placed (Pet. App. 20a-21a & n.8), the court of appeals rejected Price Waterhouse's cross-appeal only "[b]ecause Price Waterhouse could not demonstrate by clear and convincing evidence that impermissible bias was not the determinative factor" (*id.* at 25a). Price Waterhouse was held to have violated Title VII solely on the basis of the amorphous proposition that "stereotypical attitudes towards women had manifested themselves in connection with the partnership bids of other women and \* \* \* that these stereotypes had been brought to bear on [Hopkins'] candidacy" (*id.* at 20a)—even though Hopkins had not proved that she would have been made a partner in the absence of stereotyping. Indeed, the court of appeals expressly refused to require Hopkins to make any such showing. Assigning to Title VII plaintiffs the burden of proof on each element of their cases, including causation, the court held, would "place an enormous, perhaps insurmountable, burden on Title VII litigants" (*ibid.*). Instead, the court of appeals shifted the burden to Price Waterhouse to negate by "clear and convincing" evidence a fact that the court acknowledged was "impossible to measure." Pet. App. 9a.<sup>3</sup>

<sup>3</sup> In addition, the court of appeals reversed the district court and held that the decision of the OGS partners not to repropose Hopkins for partnership in 1983 constituted a "constructive discharge." Accordingly, the court remanded the case for further proceedings on the question of remedy. Pet. App. 25a-28a. Those proceedings have been stayed pending this Court's decision in this case.



In dissent, Judge Williams agreed that the central issue on appeal was causation, but observed that "the record here provided no causal connection between Hopkins's fate and such stereotyping as went on among Price Waterhouse's 662 partners." Pet. App. 29a.<sup>4</sup> Judge Williams also was troubled by Dr. Fiske's impressive claim that she was "able to find forbidden stereotyping simply by reading partners' comments—without information about the truth of the matters commented upon." *Id.* at 36a. Finally, Judge Williams objected to the majority's

<sup>4</sup> As Judge Williams noted, "[t]he only remark by a Hopkins opponent that can be characterized as manifesting sexual stereotyping is the facetious suggestion that she should take a 'course at charm school.' The smoke from this gun seems to me rather wispy. It was embedded in the following comment:

Contacts with Ann are only casual—several mtgs at OGS and MMGS sessions. However, she is consistently annoying and irritating—believes she knows more than anyone about anything, is not afraid to let the world know it. Suggest a course at charm school before she is considered for admission. I would be embarrassed to introduce her as a ptrn."

Pet. App. 33a (emphasis added). The majority was able to find evidence of sex stereotyping in the "charm school" remark only by resorting to Webster's definition, not of that term, but of the term "finishing school." See *id.* at 13a n.4. But Webster's defines "charm school" in sex-neutral terms, stating simply that it is "a school in which social graces are taught." Webster's Third New International Dictionary 378 (1986). The majority did not explain why it would be discriminatory for Price Waterhouse to insist that all of its partners, male and female, be schooled in the "social graces."

In her Brief in Opposition, Hopkins never mentioned the "charm school" remark as evidence of discrimination. Instead, she belabored a single comment made by Thomas Beyer, her strongest supporter. See Br. in Opp. 3, 4, 6, 7. Hopkins testified that *after* her partnership candidacy had been placed on "hold," Beyer advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Pet. App. 52a (citing Tr. 102, 316). The record is clear that Beyer's advice was an entirely personal reaction to Hopkins' situation and gives no probative insight into the reasons for her rejection. See Tr. 87-95, 168, 212-213. As Judge Williams correctly recognized in dissent (Pet. App. 31a-32a), the record provides absolutely no support for attributing Beyer's personal advice to the Policy Board.

willingness to find that the mere presence of stereotyping would result in Title VII liability unless the employer undertook "to institute special programs for sensitizing partners to sex stereotyping, or otherwise to stamp it out of the evaluation process." *Id.* at 37a. Judge Williams suggested that,

[i]f such an omission is to ground liability, perhaps the plaintiff should bear an initial burden of demonstrating that gender stereotyping was more probably than not the cause of the adverse employment decision. \* \* \*

From the facts here, it looks as though the duty to sensitize has a hair trigger. The implications are serious. The more delicate the trigger, the more completely this court has dropped the requirement of intentional discrimination out of the law. \* \* \* The rule turns Title VII from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts.

*Ibid.*

#### SUMMARY OF ARGUMENT

This Court has held that the burden of persuasion in Title VII disparate treatment cases remains at all times with the plaintiff. *Burdine*, 450 U.S. at 256. The court of appeals' decision contravenes that principle in at least three ways. First, the court's decision requires the *defendant* in so-called "mixed motives" cases to prove that discrimination did *not* cause the adverse employment decision, rather than requiring the plaintiff to prove that, absent unlawful discrimination, she would have been hired or promoted. Second, even if it is appropriate to relieve the plaintiff of the ultimate burden of persuasion on the question of causation in some circumstances, the court of appeals erred by requiring the defendant to make its showing by "clear and convincing" evidence. Third, the court of appeals improperly evaded the holding of *Burdine* by characterizing this case as one of "mixed motives" on the basis of intuitions about unconscious sexism—discernible only through an "expert" judgment that in fact ignored most of the *actual* evi-



dence in the case—that was not shown to have had a causal impact on the disputed employment decision. The net effect of the court of appeals' decision is to place an extraordinary and unjustified burden on an employer, even where there exists overwhelming evidence of a legitimate, nondiscriminatory, and nonpretextual basis for its refusal to promote a Title VII plaintiff.

1. The necessary starting point for analyzing this case is the *substantive* standard of Title VII liability that Congress created. The express language of Title VII, prohibiting discriminatory actions taken *because of* a plaintiff's sex (42 U.S.C. § 2000e-2(a)(1)), and specifying that Title VII relief may not be granted if the employment decision was made "for any reason other than discrimination on account of \* \* \* sex" (42 U.S.C. § 2000e-5(g)), as well as the statute's history, make it unmistakably clear that Title VII is violated only when an employment decision was in fact *caused* by a prohibited motive. Title VII does not make unlawful the mere presence of discriminatory thoughts and expressions, if those thoughts and expressions did not play a *decisive* role in the challenged employment decision. Thus, quite apart from burden of proof, the substantive standard of liability under Title VII is the "but for" standard; Title VII has not been violated if the employment decision would have been the same even in the absence of any allegedly unlawful motive.

In light of this substantive standard, allocating the burden of persuasion is not difficult. This Court's prior Title VII decisions uniformly dictate that it is the *plaintiff* who *always* bears the ultimate burden of persuasion on the issue of causation. See, e.g., *Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 805. In *all* Title VII disparate treatment cases in which the employer proffers a legitimate, nondiscriminatory reason for the employment decision, the crucial inquiry on the question of causation occurs at the third and final stage of the *Burdine* analysis, where the plaintiff must "prove by a preponderance of the evidence that the legitimate rea-

sons offered by the defendant were not its true reasons." 450 U.S. at 253.

With virtually no supporting precedent, the court of appeals here discarded the essential third stage of the *Burdine* framework, claiming that it was inapplicable in so-called "mixed motives" cases. See Pet. App. 22a. Instead, the court of appeals held that, in such cases, the *employer* must meet the heavy burden of proving the negative proposition that "impermissible bias was *not* the determinative factor" in its decision. *Id.* at 25a (emphasis added). But the court failed to explain why characterizing a case as one involving "mixed motives" justifies such a radical departure from the rules already established by this Court for resolution of the ultimate question of causation. Irrespective of whether a case can be said to involve "mixed motives," *Burdine's* holding that the plaintiff retains the "ultimate burden of persuading the court that she has been the victim of intentional discrimination" (450 U.S. at 256) precludes a Title VII *defendant* from being saddled with the burden of persuasion on the question of causation. See also *Bd. of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978) (per curiam) (defendant in Title VII case may not be required to prove *absence* of discriminatory motive).

2. The court of appeals not only switched the ultimate burden of persuasion on the question of causation from the plaintiff to the defendant; it further held that the defendant must meet that burden by the extraordinary standard of "clear and convincing" evidence. In rare and compelling circumstances this Court has been willing to impose the "clear and convincing" standard on *plaintiffs* who seek the courts' aid in imposing sanctions or duties on a defendant; but subjecting a *defendant* to coercion by a court order unless it disproves the plaintiff's allegations by "clear and convincing" evidence is wholly unprecedented. In the absence of any indication from Congress that it intended such a substantial departure from the traditional rules of the legal system, this

aspect of the court of appeals' decision cannot be allowed to stand.

3. The burden-shifting rule imposed by the court of appeals has no legitimate place whatever in Title VII disparate treatment cases. But it is in any event unjustified in this case, because this case should never have been characterized as a "mixed motives" case at all. Here, the only indication of the existence of "mixed motives" was the gossamer evidence provided by Dr. Fiske, an "expert" in the field of "sex stereotyping," who purported to find stereotyping in some of the expressions used about Hopkins in the written evaluations of her performance. But Dr. Fiske had never met Hopkins, had never met any of the Price Waterhouse partners whose comments about Hopkins she was characterizing, and knew nothing whatever of Hopkins' *actual* behavior at Price Waterhouse. Indeed, Dr. Fiske was able to conclude that "sex stereotyping" played a part in the employment decision only by *excluding* from consideration all of the actual facts of Hopkins' performance at Price Waterhouse—facts that showed that the partners' chosen words, far from reflecting stereotypic thinking, accurately described the reality of Hopkins' behavior.

If evidence such as Dr. Fiske's is sufficient to transform a case into one involving "mixed motives" for the employment decision, then virtually any case can be so labeled. *Burdine's* rule—that the *plaintiff* must prove that intentional discrimination caused her injury—will simply disappear in a sea of findings of "mixed motives" that are wholly lacking in concrete evidentiary support. At a minimum, therefore, this Court should rule that the court of appeals' burden-shifting rule may not be invoked in the absence of a substantial, concrete basis in the record to support a finding that the legitimate reason offered by the employer was not the "true reason" for its decision. Applying that standard here, it is clear that the court of appeals' burden-shifting ruling must be reversed.

## ARGUMENT

### TITLE VII IS NOT VIOLATED IN THE ABSENCE OF PROOF BY THE PLAINTIFF THAT THE CHALLENGED EMPLOYMENT DECISION WAS CAUSED BY INTENTIONAL DISCRIMINATION

#### A. A Title VII Plaintiff May Prevail Only By Showing That Forbidden Discrimination Was A "But For" Cause Of The Challenged Employment Decision.

##### 1. *As A Matter Of Substantive Law, Title VII Is Not Violated Unless Discrimination Is A "But For" Cause Of The Challenged Employment Decision.*

The ultimate question for this Court in this case is: who has the burden of persuasion on the question of why Hopkins was not promoted to partner.<sup>5</sup> But behind this issue lies an antecedent *substantive* question: apart from burdens of proof, what relationship must exist between arguably discriminatory thoughts and expressions, on the one hand, and the challenged employment decision, on the other, for Title VII to have been violated? Does Title VII make illegal the existence of discriminatory thoughts and expressions, if these do not come into play as a *decisive* reason for an employment decision? As a matter of substantive law, if a failure to promote or a discharge would have occurred in any event, even in the absence of discriminatory thoughts and expressions, has Title VII been violated?

We believe that the necessary starting point for analyzing this case is a clear understanding that the answer to these questions is unequivocally "no." Title VII does not prohibit discrimination "in the air." It has been violated only if the discrimination was a "but for" cause

<sup>5</sup> Because Hopkins alleged that she was treated differently from male partnership candidates, this case is one involving a claim of "disparate treatment" and not of "disparate impact." This Court has made it clear that issues of proof in these two types of cases are governed by different rules. See, e.g., *United States Postal Service v. Aikens*, 460 U.S. 711, 713 n.1 (1983); *Burdine*, 450 U.S. at 252 n.5.



of an adverse employment decision. If that decision would have been made in any event, because it was based on a valid, nondiscriminatory, nonpretextual reason, Title VII has not been violated.

The court of appeals in this case apparently accepted this bedrock proposition, although it did not use the "but for" terminology. The court discussed at length the various formulas that have been adopted by the lower courts to determine the substantive standard of causation applicable in Title VII cases. Pet. App. 20a-23a. The court noted that some courts have adopted a "but for" standard, while other courts have used different verbal formulas.<sup>6</sup> In the end, the court of appeals held that the crucial issue was whether or not unlawful discrimination was "the determinative factor" in the employment decision. Pet. App. 25a.<sup>7</sup>

Congress was of course aware, when it enacted Title VII, that multiple motives could exist in the workplace

<sup>6</sup> See, e.g., *McQuillen v. Wisconsin Education Ass'n Council*, 830 F.2d 659, 664 (7th Cir. 1987), cert. denied, 108 S. Ct. 1068 (1988) ("but for" standard); *Lewis v. University of Pittsburgh*, 725 F.2d 910, 915 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984) (same); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875-876 (11th Cir. 1985) ("same decision" test); *Whiting v. Jackson State University*, 616 F.2d 116, 121 (5th Cir. 1980) ("significant factor" test) (emphasis in original); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985) (plaintiff must show employment decision "more likely than not motivated by" illicit factor); *Bibbs v. Block*, 778 F.2d 1318, 1323 (8th Cir. 1985) (en banc) (enough if illicit factor played "some part" in decision).

<sup>7</sup> At least one court has held that there is a substantive difference between the court of appeals' formula in this case ("the determinative factor") and the traditional "but for" test. See *Lewis*, 725 F.2d at 916-918. Undoubtedly, increased clarity would result if a single verbal formula were used for the substantive standard of causation in Title VII cases, and, because of its long usage, the "but for" formula would serve this purpose better than any other. In the interest of clarity and consistency, therefore, we use the "but for" formula in this brief to mean that, even absent discrimination, the challenged employment decision would have been the same.

and possibly have an impact on employment decisions. But it authorized government intervention only where specific actions were in fact *caused* by discriminatory intent on the part of employers. If unlawful discrimination was not the decisive factor—if the employment decision would have been identical even where discriminatory motives and expressions are wholly absent—there can be no violation of Title VII.

The language and history of Title VII make it quite clear that Congress's goal of assuring equality of employment opportunities was not to be achieved by sacrificing the employer's traditional right to make bona fide employment decisions based on legitimate, job-related, non-discriminatory factors. As the Seventh Circuit has recently held, the express language of "Title VII contains a clear causal requirement between discriminatory motivation and the challenged employment decision." *McQuillen v. Wisconsin Education Ass'n Council*, 830 F.2d 659, 664 (7th Cir. 1987), cert. denied, 108 S. Ct. 1068 (1988). The statute provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's \* \* \* sex*" (42 U.S.C. § 2000e-2(a)(1) (emphasis added)). Further, Title VII expressly prohibits courts from requiring "the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, *if such individual was refused \* \* \* employment or advancement \* \* \* for any reason other than discrimination on account of \* \* \* sex*" (42 U.S.C. § 2000e-5(g) (emphasis added)). The statute thus makes it clear that it is not enough that discriminatory thoughts were present in the atmosphere or that discrimination was "a factor" in the challenged employment decision. It must be a factor that made a difference. If the employment decision would have been adverse to the plaintiff in any event, then the plaintiff was not discriminated against *because of her sex*; instead, she was refused "employment or advancement" for a "reason *other than discrimination*"



on account of" her sex. 42 U.S.C. §§ 2000e-2(a)(1), 5(g) (emphasis added).

A review of the legislative history makes it clear that Congress simply *assumed* that it was prohibiting discrimination that *caused* unfavorable employment decisions. For example, Representative Celler stated that "[t]he law provides that an act can be only unlawful if it is discriminatory *on the basis of* race, color, creed, sex, or national origin. \* \* \* You can discriminate on any grounds, but you can't discriminate on [illicit] grounds." *Hearing on H. Res. 789 Before the House Comm. on Rules*, 88th Cong., 2d Sess. 8 (1964).<sup>8</sup> The following exchange also is illustrative (110 Cong. Rec. 7257 (1964)):

Mr. ERVIN. I want those who are engaged in business to be allowed to determine whom they shall employ. They are far better qualified than the Federal Government to know the skills they are seeking to obtain for their business.

\* \* \* \* \*

<sup>8</sup> Much of the legislative history of Title VII was developed during debate on H.R. 7152, 88th Cong., 2d Sess. (1964). As originally introduced, Title VII of H.R. 7152 would have prohibited discrimination only on the basis of race, color, religion, or national origin. During debate, however, the House adopted an amendment extending the coverage of Title VII to sex discrimination as well. 110 Cong. Rec. 2584 (1964). This change was retained by the Senate when it substituted its own version of the bill. *Id.* at 14239. Although the Senate substitute made some major changes in the legislation, it effected no significant revisions to the House version of what became 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-5(g). The Senate substitute was accepted by the House without change when the House passed H. Res. 789, 88th Cong., 2d Sess. (1964). See 110 Cong. Rec. 15969 (1964).

Representative Celler's views are entitled to special weight in light of his role as Chairman of the House Judiciary Committee that considered and held hearings on H.R. 7152. See, e.g., *United States v. St. Paul, M. & M. Ry.*, 247 U.S. 310, 318 (1918); *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 431 n.11 (1973) (Marshall, J., dissenting). Similarly, Senator Case, whose views are noted above, served as one of the Bipartisan Captains during the Senate's consideration of Title VII.

Mr. CASE. The Senator from North Carolina knows that \* \* \* the bill provides only that such a decision could not be made on the ground of the color of a man's skin or his national origin or his creed. \* \* \* [T]he bill would take effect only when the employer had knowingly discriminated against an employee or a prospective employee because of race, color of the skin, creed, or national origin \* \* \*.

The origins of Section 2000e-5(g) are particularly revealing. As originally introduced, H.R. 7152 prohibited a court from granting relief if an "individual was \* \* \* refused employment or advancement or was suspended or discharged *for cause*" (H.R. 7152, 88th Cong., 2d Sess. 77 (1964) (emphasis added)). In debate on the bill, the phrase "for cause" was deleted and replaced with the more specific and peremptory language that now appears in 42 U.S.C. § 2000e-5(g), prohibiting relief whenever an employer acts "for *any* reason *other than*" a prohibited reason. See 110 Cong. Rec. 2567-2571 (1964) (emphasis added). Representative Celler's speech introducing this amendment makes it clear that the purpose of this section was to make the remedial provisions of the bill congruent with its substantive provisions and that the latter limited the act to situations where discrimination *caused* an unfavorable employment decision (*id.* at 2567):

Mr. Chairman, the purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other—and I emphasize "other"—than discrimination on the grounds of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin. That is the purpose of this amendment.

The same theme was echoed by Representative Gill, who explained that the purpose of the amendment was "to pinch down the orders that can be issued by the court

to a more narrow range. Thus, we would not interfere with discharges for ineptness, or drunkenness. \* \* \* *We would limit orders under this act to the purposes of this act.*" 110 Cong. Rec. 2570 (1964) (emphasis added). The history of Section 2000e-5(g) thus demonstrates that "but for" causation is essential, as a matter of substantive law, to any finding of a violation of the statute.

That the "but for" standard of causation is the correct test under Title VII is not surprising, because that test is the conventional civil law rule. Formulations less stringent than the "but for" test "in effect \* \* \* dispense with proof of anything more than a *possible* causal connection" between a discriminatory motive and the challenged decision. H.L.A. Hart & T. Honore, *Causation in the Law* liii (2d ed. 1985) (emphasis in original). As such, they would result in the imposition of liability on account of perceived "discrimination in the air"—because of vague notions of "societal discrimination" that have not been shown to have harmed the plaintiff directly. This Court has repeatedly refused to adopt such a standard. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (opinion of Powell, J.); *Regents of the University of California v. Bakke*, 438 U.S. 265, 307-308 (1978) (opinion of Powell, J.). See also *Fields v. Clark University*, 817 F.2d 931, 935 (1st Cir. 1987) (proof that "the [challenged] decision was infected with discrimination" does not necessarily entitle the plaintiff to relief).

On the one occasion that it has addressed the substantive standard of causation in Title VII cases, this Court adopted the "but for" test, albeit without extended discussion. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976). And this Court has applied a "but for" test in related contexts. See, e.g., *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (involving the standard of causation applicable to discharges based in part on protected union activity); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977)

(involving the standard of causation applicable to discharges based in part on constitutionally-protected conduct).<sup>9</sup>

Commentators also agree that a "but for" test is the appropriate substantive standard of causation. Writing in the context of an age discrimination case, one author has explained why only a "but for" test satisfies congressional intent:

If relief were granted every time age was considered, the effect might go well beyond the remedial intent of the Act, since relief arguably would be awarded to claimants who never had an opportunity for the job at any age. While such a broad construction would provide a strong deterrent against age discrimination, it probably would exceed the prohibition Congress envisioned.

Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 Vand. L. Rev. 1205, 1256 (1981).

This reasoning is equally applicable in the Title VII context, and of course makes it clear that the mere presence of some element of "sex stereotyping" in an employer's decisionmaking process does not in and of itself constitute a violation of Title VII. As Judge Williams recognized in dissent (Pet. App. 37a), Title VII was never intended to be "an engine for rooting out sexist thoughts"; the statute is a prohibition against dis-

<sup>9</sup> The "but for" test also has been adopted in cases arising under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* See, e.g., *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979) (plaintiff required to prove "that his age was the 'determining factor' in his discharge in the sense that, 'but for' his employer's motive to discriminate \* \* \* he would not have been discharged"). In language that precisely parallels Section 703 of Title VII, the ADEA expressly prohibits only those actions taken "because of" a worker's age. 29 U.S.C. § 623. Although *Loeb* arose under the ADEA, it is frequently cited in Title VII cases. See, e.g., *Burdine*, 450 U.S. at 252 n.4, 258-259; *Lewis v. University of Pittsburgh*, 725 F.2d at 917 n.8; *Monteiro v. Poole Silver Co.*, 615 F.2d 4, 9 (1st Cir. 1980).



criminatory *conduct* that actually *causes* an adverse employment decision.

This case gives this Court an opportunity to reaffirm the fundamental proposition that Title VII as a substantive matter is not violated unless discrimination was a "but for" cause of an adverse employment decision. That this proposition has recently suffered from erosion is apparent from an examination of the Eighth Circuit's unsound decision in *Bibbs v. Block*, 778 F.2d 1318 (1985) (en banc). There, the court held that an employer is *liable* under Title VII even if the plaintiff shows only "that an unlawful motive played *some part* in the employment decision." 778 F.2d at 1323 (emphasis added). The court ruled that such a showing is sufficient to entitle the employee, at a minimum, to a remedy such as declaratory or injunctive relief and partial attorneys' fees. *Id.* at 1324. Although the Eighth Circuit also held that an employer can avoid the imposition of additional relief, such as reinstatement or back pay, if he shows by a preponderance of the evidence that the plaintiff would not have been hired or promoted in any event (*ibid.*), this supposed mitigation should not be allowed to conceal the real effect of the Eighth Circuit's position: a defendant may be held to have violated Title VII even if an illicit factor did not play a *decisive* role in the employment decision.<sup>10</sup> That result is inconsistent with Title VII.<sup>11</sup>

<sup>10</sup> The Ninth Circuit employs an analysis similar to that adopted in *Bibbs*, but takes an even more extreme position by requiring the defendant to prove *by clear and convincing evidence* that it would have taken the same action absent the prohibited motivation if it is to avoid the award of affirmative relief. *E.g., Fadhl v. City & County of San Francisco*, 741 F.2d 1163 (9th Cir. 1984).

<sup>11</sup> In large part, the Eighth Circuit rested its decision on the supposition that Title VII itself, in 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-5(g), distinguishes between the liability and remedy phases of a Title VII case. See 778 F.2d at 1321-1322. This is a clear misreading of the statute. First, the liability provision of the statute, 42 U.S.C. § 2000e-2(a), explicitly requires a *causal* relationship between the discriminatory motive and the employment decision at issue. See page 23, *supra*. Thus, the notion that lia-

## 2. The Plaintiff Properly Bears The Burden Of Persuasion On The Issue Of "But For" Causation.

Once it is clearly understood that Congress did not intend to create any substantive liability under Title VII except in cases where discrimination played a decisive role in an employment decision, the proper allocation of the burden of persuasion on the issue of causation becomes apparent: the plaintiff's case fails unless she shows by a preponderance of the evidence that, but for discrimination, she would have been promoted. Congress's purpose to "specify cause" and "pinch down" and "limit" relief to cases where it would achieve the "purposes of the act," and to *exclude* from liability cases where the employment decision is based on facts "other \* \* \* than discrimination" (see remarks of Representatives Celler and Gill, at pages 25-26, *supra*), cannot be achieved if liability is imposed without an *affirmative* showing that discrimination *caused* an unfavorable employment decision. Shifting the burden of persuasion will have the inevitable tendency to sweep within the statute's coverage numerous cases where the employer in fact acted on a bona fide basis, but cannot establish the negative proposition, that discrimination was *not* a decisive factor in its decision. Imposing the burden of persuasion on the employer will therefore have the effect of producing the very result Congress sought to avoid: it will turn Title VII into a statute that punishes legitimate employment decisions *not* based on "race, color, creed, sex, or national origin" (remarks of Rep. Celler, page 24, *supra*).

bility under Title VII may rest on a finding that an illegal motive was merely present is untenable. Second, the legislative history makes it clear that Section 2000e-2(a) and the remedy provision, Section 2000e-5(g), were intended to operate in tandem. As we have noted (see page 25, *supra*), Representative Celler described his amendment to the statute's remedy provision by explaining that its purpose was to "specify cause" and to preclude a court from "find[ing] any *violation* of the act" based on facts other than illicit discrimination. 110 Cong. Rec. 2567 (1964) (emphasis added). Clearly, there was no intent to limit the requirement of a causal connection to the remedy phase of a Title VII case.



This Court already has determined that the general rules governing the trial of Title VII suits are to be no different from the rules applicable in other kinds of civil litigation. See, e.g., *United States Postal Service v. Aikens*, 460 U.S. 711, 716 (1983) (stating that the differences between Title VII litigation and other civil cases do not mean "that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact"). And *Burdine* itself instructs that the burden of proof is allocated in discrimination cases in the same way it is allocated in other kinds of civil litigation. The ultimate question in a Title VII case, on which the burden of persuasion *never* shifts from the plaintiff, is whether intentional discrimination actually caused the plaintiff's injury. *Burdine*, 450 U.S. at 253-256. Thus, *Burdine* clearly precludes a Title VII defendant from being saddled with proving the *negative* of what this Court already has determined to be the plaintiff's ultimate burden.

Contrary to the court of appeals' view (Pet. App. 22a), *Burdine* and its predecessor, *McDonnell Douglas*, supply the framework for analyzing the ultimate question of intentional discrimination in *all* Title VII disparate treatment cases in which the defendant has advanced a legitimate reason for its employment decision, including so-called "mixed motives" cases. *Burdine* teaches that in *any* case where the employer proffers a nondiscriminatory reason for its action, and so "raises a genuine issue of fact as to whether it discriminated against the plaintiff" (450 U.S. at 254-255), "the burden of persuasion [is on the plaintiff] to demonstrate that the [defendant's] proffered reason was not the true reason for the employment decision" (*id.* at 256), but was a pretext.

In the present case, as in any so-called "mixed motives" case, there can be no serious dispute concerning the first two stages of the *Burdine* framework. Hopkins satisfied *Burdine*'s prima facie case requirement, and Price Waterhouse more than met its burden of "articulating"

a legitimate, nondiscriminatory basis for its decision. Thus, the crucial portion of the *Burdine* analysis is the third and final stage, at which Hopkins should have been required "to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons" (450 U.S. at 253).

According to the court of appeals, however, this third and vital *Burdine* stage disappears altogether in "mixed motives" cases. The plaintiff need no longer prove, once the employer has demonstrated legitimate motives, that those "were not [the employer's] true reasons," but may rest on her showing of discriminatory motive (or, as in this case, a showing of unconscious "sex stereotyping"), confident of success unless the employer can meet the heavy burden of proving the negative proposition that "impermissible bias was not the determinative factor" in its decision (Pet. App. 25a).

The court of appeals utterly failed to explain why the third and final stage of the *Burdine* framework does not sufficiently answer the ultimate question of causation in a "mixed motives" case. If a plaintiff succeeds in proving that the employer's proffered motive was pretextual and not its true reason, she will simultaneously have succeeded in proving that, but for intentional discrimination, the challenged employment decision would not have been made. This is so irrespective of whether the case is characterized as involving "mixed motives."<sup>12</sup> Given the

<sup>12</sup> The court of appeals' mistaken belief that the *Burdine* framework and its crucial third stage are inapplicable in "mixed motives" cases may have resulted from an unduly narrow understanding of what the *Burdine* Court meant by a "pretextual" reason. The court of appeals seems to have thought that in order to prove that a legitimate reason proffered by an employer was "pretextual," and not the "true reason" for the challenged employment action, the plaintiff must demonstrate that the reason given was "in fact a coverup for a \* \* \* discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. Having apparently read *Burdine* as governing only the narrow class of cases in which the plaintiff alleges that the employer's

identity of the ultimate issue in all cases in which the parties make differing claims about what in fact caused the challenged employment decision—an issue as to which *Burdine* teaches that the plaintiff always bears the burden of persuasion—there can be “no basis for transposing a burden of proof upon a private employer in a Title VII \* \* \* case, irrespective of the nature or quantum of the plaintiff’s proof.” Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique*, 43 Wash. & Lee L. Rev. 1, 23 (1986). See *Bd. of Trustees v. Sweeney*, 439 U.S. 24, 29 (1978) (Stevens, J., dissenting) (in disparate treatment cases, “the ultimate question involves an identification of the real reason for the employment decision. On that question—as all the [Court’s Title VII] cases make perfectly clear—it is only the burden of producing evidence \* \* \* which shifts to the employer; the burden of persuasion \* \* \* remains with the plaintiff”).<sup>13</sup>

proffered reason is a “coverup,” the court of appeals then felt free to ignore the *Burdine* framework in “mixed motives” cases.

This is an untenable reading of this Court’s precedents. The Court plainly stated in *McDonnell Douglas* that after the defendant has asserted a valid reason for its decision, the plaintiff might meet her burden of persuasion on the issue of intentional discrimination either by showing the proffered reason to be a “coverup” or by showing that “whatever the stated reasons for [her] rejection, the decision was in reality \* \* \* premised” on discriminatory factors (411 U.S. at 805 & n.18)—that is, that the illegitimate motive was a “but for” cause of the decision reached. Furthermore, *Burdine* clearly treats “pretextual” reasons very broadly, including within that characterization any reason that is not the “true reason” that accounts for the employer’s decision. 450 U.S. at 253, 256.

The court of appeals’ position that different burden of proof rules apply depending on whether “intentional discrimination” is alleged to exist because the employer’s stated reason for its decision is a “coverup,” or because it is by itself insufficient to explain the decision reached, directly conflicts with the teaching of *McDonnell Douglas* and *Burdine* that the plaintiff bears the ultimate burden of persuasion in any attempt to show that a legitimate reason proffered by the employer was not its “true reason.”

<sup>13</sup> Significantly, Hopkins herself recognized that the only real disputed issue in this case was whether Price Waterhouse’s prof-

The court of appeals’ rule that *Burdine* is inapplicable in so called “mixed motives” cases (not involving a “coverup” (see note 12, *supra*)) renders nearly useless the delicately balanced analytical framework this Court established in that case. It is a rare Title VII action in which the plaintiff cannot make the claim that the employer had “mixed motives.” Cf. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) (noting in the context of legislative or administrative decisions that it can “[r]arely \* \* \* be said that \* \* \* a decision [was] motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one”). Thus, under the court of appeals’ approach, the *Burdine* framework will have no application in the usual disparate treatment action, and as a general rule it will be the defendant who, contrary to the principle enunciated in *Burdine*, must prove that a discriminatory motive was *not* a “but for” cause of its action.<sup>14</sup>

ferred explanation for its decision was pretextual and not its true reason, and she framed her argument to the district court in accordance with the traditional *McDonnell Douglas-Burdine* analysis. See, e.g., Plaintiff’s Trial Brief 6; Plaintiff’s Post-Trial Brief 11.

<sup>14</sup> In *NLRB v. Transportation Management Corp.*, the Court deferred to the NLRB’s position that once the General Counsel of the Board has proved that conduct protected by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, was a “substantial” or “motivating” factor in the discharge of an employee, the burden shifts to the employer to prove, by a preponderance of the evidence, “that the discharge would have occurred in any event and for valid reasons” (462 U.S. at 400). *Transportation Management* simply makes it clear that an agency to which Congress has granted broad general powers has authority to adopt this burden of proof allocation. See *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-959 (D.C. Cir. 1984) (*Transportation Management* makes clear that agency such as Federal Mine Safety and Health Review Commission has power to shift burden to defendant to show plaintiff would have been discharged even absent plaintiff’s engaging in protected activity). This rule of deference to agency interpretations of their governing statutes is hardly unique (cf. *Chevron*



The court of appeals' unwarranted evisceration of the *Burdine* analysis not only lacks precedential support, but is incompatible with the clear intent of Congress that the plaintiff must prove the causal link between discrimination and the challenged employment decision. See, e.g., 110 Cong. Rec. 2560 (Rep. Goodell) (emphasis added) ("[t]he burden would be on the complainant to show that there had been discrimination. \* \* \* The burden all the way would be on those who alleged the discrimination"); *id.* at 6549 (Sen. Humphrey) ("plaintiff would have the burden of proving that discrimination had occurred"); *id.* at 7214 (Interpretative Memorandum submitted by Sen. Clark and Sen. Case, bipartisan floor managers) ("the plaintiff, as in any civil case, would

*U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-845 (1984)), but it sheds no light on this Court's task of interpreting Title VII.

In *Mt. Healthy*, 429 U.S. at 287, this Court held that once a plaintiff has shown that constitutionally protected conduct was a "substantial" or "motivating" factor in an adverse employment decision, the burden shifts to the defendant to prove, by a preponderance of the evidence, that it would have reached the same employment decision in the absence of the protected conduct. Of course, *Mt. Healthy* and *Transportation Management* addressed neither the specific language of Title VII nor the clear congressional intent that a Title VII plaintiff bears the ultimate burden of proving that a discriminatory motive made a difference to the decision the employer reached. As one commentator has observed, "[a]lthough *Mt. Healthy* may be applicable to constitutional claims involving free speech, equal protection, or due process, there is no basis for transposing a burden of proof upon a private employer in a Title VII \* \* \* disparate treatment case." Edwards, *supra*, 43 Wash. & Lee L. Rev. at 23 (emphasis added).

It is of course these distinguishing factors that made it unnecessary for the Seventh Circuit to discuss *Transportation Management* and *Mt. Healthy* in holding that the burden of persuasion in a Title VII disparate treatment case never shifts from the plaintiff, even if the case can be characterized as one involving "mixed motives." *McQuillen*, 830 F.2d at 664. See also *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 179 (3d Cir. 1985), cert. denied, 475 U.S. 1035 (1986); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365-366 (4th Cir. 1985); *Jack v. Texaco Research Center*, 743 F.2d 1129, 1131 (5th Cir. 1984).

have the burden of proving that discrimination had occurred"); *id.* at 7255 (Sen. Case) ("[t]he burden of proof is on the plaintiff"); *id.* at 15866 (Sen. Humphrey) ("[t]he burden of proof that discrimination has occurred rests with the complainant").

Traditional indicia for identifying who must bear the burden of persuasion on a fact also lead to the conclusion that the plaintiff in a disparate treatment suit must prove that discrimination was a "but for" cause of the employer's action. The burden of persuasion traditionally is borne by "the party to whose case the fact is essential." 9 J. Wigmore, *Evidence* § 2486, at 288 (Chadbourn rev. 1981) (emphasis in original). As shown above, the language and legislative history of Title VII demonstrate that it is essential to liability under the statute that unlawful discrimination was a "but for" cause of the employment decision of which the plaintiff complains. Since causation is essential to the plaintiff's case, Congress logically provided that the plaintiff should bear the burden of proving it. Similarly, the burden of persuasion is often said to be "upon the party having in form the affirmative allegation." *Ibid.* (emphasis in original). On the issue of causation, that party is obviously the plaintiff.<sup>15</sup>

<sup>15</sup> The third indicator mentioned by Wigmore—that the burden of persuasion as to a fact is borne by a party "who presumably has peculiar means of knowledge" as to that fact (9 Wigmore, *Evidence* § 2486, at 290 (emphasis in original))—does not suggest that a Title VII defendant should bear the burden of persuasion on causation. As this Court noted in *Burdine*, "the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint," so that a plaintiff should not "find it particularly difficult to prove" the "factual basis" for her case. 450 U.S. at 258. The present case attests to the accuracy of the *Burdine* Court's prediction that a plaintiff would have access to all the information necessary to meet her burden of persuasion. As the district court pointed out, there was "extensive discovery" in this case (Pet. App. 40a), and "Price Waterhouse [was] very forthcoming in providing information on its partnership [selection] process" (*id.* at 49a). In



The court of appeals' rule, placing the burden of disproving intentional discrimination on the employer is, finally, perversely at odds with one of the Court's primary purposes in formulating the *Burdine* framework—to provide a structure that would “bring the litigants and the court expeditiously and fairly to [the] ultimate question” whether the plaintiff has persuaded the trier of fact that intentional discrimination caused her injury. 450 U.S. at 253. The court of appeals' insistence that the *McDonnell Douglas-Burdine* framework is inapplicable in so-called “mixed motives” cases runs counter to this goal by requiring litigants and courts to employ a different mode of analysis even though the ultimate factual inquiry remains exactly the same—whether intentional discrimination in fact caused the injury of which the plaintiff complains.<sup>16</sup>

**B. Even If A Defendant Must Show That The Same Decision Would Have Been Made Without The Forbidden Motive, The Court Of Appeals Erred By Requiring That That Showing Be Made By “Clear And Convincing” Evidence.**

The court of appeals not only switched the burden of proof to the defendant; it also held that the defendant must meet that burden by “clear and convincing” evi-

fact, “Price Waterhouse made every document generated by [its partnership] admissions process on candidates proposed for admission in 1982, 1983 and 1984 available to the plaintiff during the course of discovery in this case” (*id.* at 42a).

<sup>16</sup> The proliferation of differing standards and burdens of proof all intended to answer the same question can only add needless complications to the trial of Title VII actions without producing any offsetting gains. Lower federal courts have noted the confusion regarding the proper standards of proof in Title VII cases, thus highlighting the need for a single, easily-applied formula for the trial of these actions. See, e.g., *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d at 179; *Lewis v. University of Pittsburgh*, 725 F.2d at 921 (Adams, J., dissenting); *Unger v. Consolidated Foods Corp.*, 657 F.2d 909, 916 n.9 (7th Cir. 1981), vacated, 456 U.S. 1002 (1982) (noting “nearly continuous confusion in the lower courts” on Title VII burdens).

dence. Requiring a *defendant* to bear such a heavy burden is without precedent in this Court's cases. The Court has, on occasion, deemed it appropriate to require *plaintiffs*, who seek the courts' aid in imposing a duty on defendants, to make a showing by “clear and convincing” evidence before that affirmative intervention will occur. But the Court has *never*, as far as we know, held that a *defendant* may be subjected to coercion by a court order unless the defendant disproves the plaintiff's allegations by “clear and convincing” evidence. To impose such a rule on Title VII defendants, without a clear statement by Congress that it wished to perpetrate such a radical innovation, would be fundamentally unfair and illegitimate.

This Court has already indicated that the rules that apply in Title VII cases should not differ from the rules that apply in other civil cases:

All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be “eyewitness” testimony as to the employer's mental processes. *But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.*

*Aikens*, 460 U.S. at 716 (emphasis added); see also *id.* at 718 (Blackmun, J., concurring) (“the ultimate determination of factual liability in discrimination cases should be no different from that in other types of civil suits”).

The standard rule in our legal system is that facts are shown by a preponderance of evidence. “The preponderance of the evidence standard \* \* \* is the standard that is applied most frequently in litigation between private parties in every State.” *Rivera v. Minnich*, 107 S. Ct. 3001, 3003 (1987); see also *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983); *Addington v. Texas*,

441 U.S. 418, 423 (1979); E. Cleary, *McCormick on Evidence* § 340, at 959 (3d ed. 1984); 9 Wigmore, *supra*, § 2498, at 419. And the general use of the preponderance standard is based on the soundest of reasons: it minimizes the risk of erroneous decisions.<sup>17</sup> The preponderance standard is thus the standard most consistent with "[t]he function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, [which] is to minimize the risk of erroneous decisions." *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 13 (1979); see Brook, *supra*, at 109 ("Trying to be right as often as possible may be the best we can do."). Further, the preponderance standard is equitable; it "allows both parties to 'share the risk of error in roughly equal fashion.' Any other standard expresses a preference for one side's interests." *Herman & MacLean*, 459 U.S. at 390 (quoting *Addington*, 441 U.S. at 423) (emphasis added).

There must, therefore, exist important reasons before we depart from an equal allocation of the risk of error in civil cases. This Court has, on rare occasions, found such reasons. But all such cases have involved the judgment that the coercive intervention of a court should be withheld unless a strong justification is first shown by the plaintiff; none has used the "clear and convincing" test in order to make such an intervention *easier*.

<sup>17</sup> See, e.g., 2 K. Davis, *Administrative Law Treatise* § 10.4, at 319 (1979) (elevated standards are "inconsistent with accuracy"); Brook, *Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation*, 18 Tulsa L.J. 79, 86 (1982) (preponderance standard "is the one which must be adopted if the decisionmaker's goal is to minimize the absolute number of total errors which will arise from the course of decisions in the long run"); Winter, *The Jury and the Risk of Nonpersuasion*, 5 Law & Soc. Rev. 335, 337 (1971) (preponderance standard results in correct decisions over 50% of the time, while elevated standards "would tend to cause more incorrect decisions than correct ones").

It is thus revealing that, with the exception of defamation cases and a few old equity cases,<sup>18</sup> all such cases have involved "government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'" *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (citations omitted) (emphasis added). For example, the Court has held that the "clear and convincing" standard applies in proceedings to terminate the "fundamental" and "precious" interest in parental rights, *id.* at 753, 758; in involuntary commitment proceedings, *Addington*, 441 U.S. at 427 (individual's interest is of such "weight and gravity" that higher standard of proof is warranted); in deportation proceedings, *Woodby v. INS*, 385 U.S. 276 (1966); and in denaturalization proceedings, *Schneiderman v. United States*, 320 U.S. 118, 122, 125 (1943) (citizenship interest is so "precious" as to be "the highest hope of civilized men"). On the other hand, the Court has declined to impose the "clear and convincing" standard even in the case of serious governmental impositions such as expatriation and disqualification from a chosen profession.<sup>19</sup>

<sup>18</sup> It is by now hornbook law that public figure plaintiffs in defamation cases must prove actual malice by clear and convincing evidence. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29, 52-53 (1971) (plurality opinion); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-286 (1964). Defamation cases are not government-initiated. They are similar to the other cases in which this Court has invoked an elevated standard, however, in that they involve a grave threat to the constitutionally protected interest in free speech.

In the equity cases, the Court imposed the clear and convincing standard on plaintiffs for actions brought to set aside, on the basis of fraud, patents for inventions, see *United States v. American Bell Tel. Co.*, 167 U.S. 224 (1897), contracts for sale of land, see *Southern Development Co. v. Silva*, 125 U.S. 247 (1888), and land patents, see *Maxwell Land-Grant Case*, 121 U.S. 325 (1887). In these cases, the Court obviously was moved by the special need for stability when dealing with settled property interests.

<sup>19</sup> The Court has held that due process does not require the use of an elevated standard in expatriation cases. *Vance v. Terrazas*,



The message of all this jurisprudence is clear: only the gravest deprivations warrant sacrificing the greater accuracy and fairness provided by the preponderance standard. More generally, we reiterate that this Court's rare invocations of the "clear and convincing" standard, whether in a government-initiated proceeding, a defamation action, or an equity proceeding to set aside a written instrument, have *always* been to protect the rights of the defendant.<sup>20</sup> *Never has this Court required a defendant to bear a burden of "clear and convincing" evidence.*

In this light, it becomes obvious that it would be entirely anomalous to place on a Title VII defendant the burden of disproving the plaintiff's allegations of intentional discrimination by "clear and convincing" evi-

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444 U.S. 252 (1980). Several years prior to *Terrazas*, the Court, in the absence of congressional direction, had invoked the "clear and convincing" standard for expatriation proceedings. The Court did so because it found the consequences of such proceedings to be "drastic." *Nishikawa v. Dulles*, 356 U.S. 129, 134 (1958). After *Nishikawa*, Congress specified that the preponderance standard should be used in expatriation proceedings. The Court in *Terrazas* held that due process did not require a higher standard, explaining that "expatriation proceedings are civil in nature and do not threaten a loss of liberty." *Terrazas*, 444 U.S. at 266.

The Court also refused to invoke the "clear and convincing" standard for proceedings to disbar investment advisers under the securities laws. *Steadman v. SEC*, 450 U.S. 91 (1981). Even though the defendant in such a proceeding stands to lose his livelihood, the Court found no occasion for departing from the preponderance standard typically employed in civil litigation.

<sup>20</sup> As we noted earlier (see note 14, *supra*), the Court from time to time has permitted an evidentiary burden to shift to the defendant after the plaintiff has established the existence of an improper motive. See *NLRB v. Transportation Management Corp.*; *Mt. Healthy City School Dist. v. Doyle*. It is notable that in these cases the Court assumed, as if no discussion were needed, that the burden placed on the defendant was the traditional preponderance standard. *Transportation Management*, 462 U.S. at 403; *Mt. Healthy*, 429 U.S. at 287.

dence.<sup>21</sup> It is the Title VII defendant, not the Title VII plaintiff, who is threatened with the stigma of a coercive governmental sanction. It is the Title VII plaintiff, not the Title VII defendant, who seeks the affirmative intervention of the government to reorder the workplace. Any analogy between this situation and cases such as denaturalization and loss of parental rights is obviously misplaced.

We have already explained above (see pages 29-35, *supra*) that shifting the burden of persuasion to the de-

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<sup>21</sup> In her Brief in Opposition (at 12), Hopkins relied on a regulation promulgated by the Equal Employment Opportunity Commission that imposes a burden of "clear and convincing" evidence on federal agency employers in "mixed motives" cases. See 29 C.F.R. § 1613.271. Her reliance is misplaced.

For one thing, this regulation applies only to federal administrative proceedings, not to judicial proceedings involving either federal or private sector employees. Cf. *Bibbs v. Block*, 778 F.2d at 1324 n.5 (in federal employee's Title VII action, court expressly rejected the "clear and convincing" standard in favor of the preponderance standard). In federal administrative proceedings, the government is of course free to impose a higher burden upon itself than Title VII requires, but the EEOC has no authority to establish rules of decision for the federal courts. See *Woodby v. INS*, 385 U.S. at 284 (establishing burdens of proof "is the kind of question which has traditionally been left to the judiciary to resolve").

Second, the regulation itself has no power to persuade. In adopting it in 1978, the Civil Service Commission, predecessor to the EEOC, stated only that applying a less elevated standard "is inconsistent with recent court decisions" and that it desired "to bring its administrative process into conformity with the clear intent of the courts." 43 Fed. Reg. 33732 (1978). The only cases invoking the "clear and convincing" test at that time, however, were *Day v. Matthews*, 530 F.2d 1083, 1085-1086 (D.C. Cir. 1976), and the Fifth Circuit cases upon which *Day* exclusively relied. The Fifth Circuit is, however, no longer willing to shift the burden to defendants, let alone impose a burden of "clear and convincing" proof. See, e.g., *Jack v. Texaco Research Center*, 743 F.2d 1129, 1131 (5th Cir. 1984). Given that the only remaining support for the EEOC regulation is the D.C. Circuit precedent for the very case that is now under review, it makes no sense to ask this Court to defer or give any weight whatever to this regulation.



fendant in Title VII cases itself threatens the achievement of Congress's goal to limit Title VII to cases where discrimination was in fact the cause of an adverse employment decision. That threat would be immensely magnified if the burden on the defendant were raised to a "clear and convincing" standard. The point is vividly illustrated by the facts of this case. Price Waterhouse made a persuasive showing that the failure to promote Hopkins was based on serious deficiencies in her qualifications, not on her sex. It was, precisely, in order to discount that showing that the court of appeals resorted to the "clear and convincing" test as a requirement for the defendant. Here, and in future cases, the effect of that test is to make it virtually impossible for the defendant to rebut the plaintiff's allegations of intentional discrimination. The result will be to hinder, rather than aid, the "broad overriding interest shared by employer, employee and consumer": the achievement of "efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions" (*Burdine*, 450 U.S. at 259) (citations omitted)).

Radical innovations in the law—such as placing on a defendant the burden of persuasion to disprove an allegation of intentional discrimination, and then requiring that this be done by "clear and convincing" evidence—should come, if at all, from Congress. In the absence of a clear statement by Congress that it wished to create such an inequitable rule, the decision of the court of appeals to impose such a requirement cannot stand.

**C. The Court Of Appeals Evaded This Court's Decision In *Burdine* By Improperly Characterizing This Case As One Involving "Mixed Motives."**

The court of appeals in this case adopted an approach to the burden of proof issue that makes it virtually impossible for an employer to win a Title VII case, even though there exists overwhelming evidence of a valid, nondiscriminatory reason for the employment decision.

Worse yet, this Draconian approach was applied to a case that should never have been characterized as a "mixed motives" case at all.

The court of appeals did not disturb the district court's findings that, under *Burdine*, would have required a judgment for the defendant: *first*, that Price Waterhouse had established a legitimate, nondiscriminatory explanation for its decision not to make Hopkins a partner; and, *second*, that Hopkins failed to show that this explanation was not the "true reason" for the decision, and, in fact, had not proved that she would have been made a partner even in the absence of "sex stereotyping." Rather, the court ruled that a Title VII violation had occurred solely because some participants in the evaluation process (but not the actual decisionmakers themselves) had engaged in unconscious and unquantifiable "sex stereotyping" and because the firm had not taken steps to eliminate this improper element from the environment.

The court of appeals then evaded *Burdine* by proceeding on this ephemeral basis to characterize the case as one where "mixed motives" were present (and a shift in the burden of persuasion therefore warranted). As we have shown above (at pages 29-36, *supra*), shifting the burdens and standards of proof, even in real "mixed motives" cases, cannot be reconciled with *Burdine*. But, assuming that there exists a category of Title VII cases in which it would be appropriate to shift the burden of persuasion to the defendant, the court of appeals erred in applying its rule to this case, where the only evidence of the existence of "mixed motives" was the presence of an intuitively divined element of sexual stereotyping in the atmosphere, and where there was *no concrete evidence* that *that* element played any causal role at all in the employment decision. Virtually any case can be transformed into one of "mixed motives" on the type of showing made here. Under the court of appeals' ap-

proach, the *Burdine* rule, which unequivocally places the ultimate burden of persuasion in discrimination cases upon the plaintiff, will simply be swallowed up by the "mixed motives" exception, and employers will be deprived of the opportunity fairly to contest Title VII cases based upon the rules adopted by Congress as interpreted by this Court.

"The application of law requires a factual predicate; an action without such a predicate is lawless." Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020, 1021 (1956). The necessary factual predicate for bringing the burden-shifting rule into operation must consist of substantial evidence that Price Waterhouse's explanation for failing to promote Hopkins was not the "true reason" for its action (*Burdine*, 450 U.S. at 256). But in this case a series of conjuring tricks was permitted to substitute for substantial evidence. Price Waterhouse's overwhelming evidence that Hopkins was not qualified was discounted, and intentional discrimination found, on the basis of a chain of intuitive hunches about "unconscious" sexism that may have played an "unquantifiable" role in an employment decision—hunches that were arrived at by Dr. Fiske without inquiry into the actual facts that motivated Price Waterhouse's decision. These hunches then were, in turn, magically transformed into evidentiary "facts" by a shift in the burden of persuasion. What was missing was the crucial premise for bringing the "mixed motives" burden of proof rule into play at all: an antecedent finding that there exists in the record as a whole a substantial and objective *basis* for concluding that discriminatory factors played a causal (motivational) role in the decision not to promote Hopkins.

We have already explained why the burden-shifting analysis employed in *Mt. Healthy* and *Transportation Management* should not be applied to Title VII disparate treatment cases. But even assuming that burden-shifting may be appropriate in some Title VII cases, the Court

should in any event require, as a threshold matter, that the plaintiff establish the same substantial factual predicate that supported the claims of unlawful motivation in those cases. In *Transportation Management*, for example, the evidence of the prohibited motive was clear and unequivocal: the discharged employee's supervisor, upon learning of the employee's union organizing activities, referred to him as "two-faced" and "promised to get even with him." 462 U.S. at 396. And in *Mt. Healthy* the school district expressly advised Doyle that its decision not to renew his contract was based at least in part on Doyle's communications with a radio station about an issue of concern to the school district—conduct that this Court held was constitutionally protected. 429 U.S. at 282-284. The evidence of the causal role of unlawful motivation was substantial and objectively ascertainable. Nothing in either *Transportation Management* or *Mt. Healthy* even remotely suggests that the Court would have found "mixed motives" in those cases in the absence of such a predicate.

The evidence in this case stands in stark contrast and vividly illustrates the danger that the court of appeals' "mixed motives" analysis will dissolve *Burdine*'s fundamental rule. Here, the courts below relied almost entirely on the "expert" testimony of Dr. Fiske to support the conclusion that "sex stereotyping" played a significant role in the challenged partnership decision. But Dr. Fiske made no inquiry at all into the concrete facts of Hopkins' performance at Price Waterhouse, facts that were before the Policy Board. She simply isolated some of the language used by Price Waterhouse partners in their written evaluations and labeled the partners' choice of words as "stereotypic thinking." The court of appeals accepted Dr. Fiske's assertion that this conclusion was valid, even though Dr. Fiske had never met Hopkins, had never met any of the partners whose comments about Hopkins she categorically condemned, and knew nothing whatever of Hopkins' *actual* behavior at Price Water-



house. Plainly, this is not substantial, concrete evidence that "stereotyping" even occurred, let alone that it may have played a causal role in the challenged employment decision.

Even strong proponents of sex stereotyping as a theory of liability under Title VII agree that it should give way in the face of "specific instances of unacceptable or undesirable behavior" on the part of the employee—instances showing that the use of supposedly stereotypic words to describe a woman, such as "aggressive," are not stereotypic at all but instead represent the reality of the situation and provide support for the employer's claim that it had a legitimate business reason for rejecting an applicant. See Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. Rev. 345, 395-397 (1980). Here, the only plausible conclusion that can be drawn from the record as a whole is that the partners' chosen words, far from reflecting supposedly stereotypic thinking, accurately described "specific instances" of unacceptable and undesirable behavior. For example, Hopkins' most ardent supporter, Thomas Beyer, testified that he had heard complaints about her relations with staff "almost from the day [Beyer] joined the Office of Government Services in 1979." Tr. 163-164. One of the St. Louis partners supported his evaluation by noting that Hopkins' management style of "using 'trial & error techniques' \* \* \* caused a complete alienation of the staff towards Ann & a fear that they would have to work with Ann if we won the project." Def. Exh. 27 (emphasis added). Moreover, the record is replete with particularized examples of Hopkins' difficult relations with staff, ranging from the "vitriolic" attack she launched on various OGS staff members (see page 8, *supra*), to her screaming obscenities at a consultant for 45 minutes (Tr. 193). Surely this provided more than ample support for suggesting that she would benefit from "a course at charm school," that she could "be abrasive, unduly

harsh, difficult to work with &, as a result, cause[d] significant turmoil," and that, as the Policy Board ultimately concluded, she needed to develop "social grace" before becoming a partner at Price Waterhouse (Def. Exh. 38). Had Dr. Fiske taken the trouble to investigate the factual foundation of the comments she categorically condemned as stereotypic, she would have been forced to acknowledge that they were supported by "specific instances of unacceptable or undesirable behavior" (Taub, *supra*, 21 B.C.L. Rev. at 395).

Significantly, unlike Dr. Fiske, the Admissions Committee at Price Waterhouse *did* investigate the factual bases of the negative comments about Hopkins (as well as those made about other candidates) by making personal visits to partners who had filled out evaluation forms in order to get a better understanding of the actual reasons for the partners' recommendations. See, e.g., Tr. 244-245, 254-257, 560-561. Thus, the Admissions Committee made its recommendation to the Policy Board not simply on the basis of the supposedly stereotypic remarks reflected in the partners' written comments, but on the basis of personal interviews that brought out the underlying facts.<sup>22</sup>

<sup>22</sup> In fact, Dr. Fiske admitted that "external" explanations for the comments about Hopkins *may* have existed; yet she insisted that she could characterize the process as tainted without investigating whether or not they *did* exist. Here is an exchange between the district judge and Dr. Fiske (J.A. 34):

THE COURT: Well, now take a partner who is supervising the plaintiff. And she asks for his advice and he gives it to her. And she comes back \* \* \*. She tells him that his advice was stupid. And she busts into his room without knocking when the door is closed, frequently. \* \* \*

Now, what are you trying to tell me about that, that under those facts his vote should not be counted or that he is discriminating sexually?

THE WITNESS: No, I am not trying to say that. \* \* \* Any given incident like that frequently has an external explanation \* \* \*.



Furthermore, Dr. Fiske's testimony—even assuming it correctly categorized particular comments as stereotypical—provided no basis for a finding that stereotyping had an impact upon the Policy Board's decision to place Hopkins' partnership candidacy on hold. In fact, nothing in the record supports the conclusion that the Policy Board based its decision on anything other than the objective facts that *all* the evaluations, whether or not stereotypical, recounted about Hopkins. And, as Judge Williams demonstrated in his dissent (Pet. App. 30a-36a), the handful of statements upon which Dr. Fiske relied for her "stereotyping" conclusion were, virtually without exception, either (1) made by Hopkins' *supporters* and therefore were unlikely to have adversely affected her partnership candidacy, or (2) made at a remote time and about other women who *did* become partners, or (3) made by persons outside the decision-making chain, so that no adverse effect on Hopkins could have occurred, and/or (4) made in a fashion so that the implications of the statements were either utterly benign or, at worst, ambiguous, requiring a healthy imagination to assign illicit motivation to them. At the most, therefore, these comments might conceivably be taken as indicating that stereotypical thinking was sometimes present "in the air" at Price Waterhouse—not as evidence of discrimination in the *particular* decision to hold Hopkins' partnership bid (see Pet. App. 30a) (Williams, J., dissenting).

In sum, Dr. Fiske's testimony could provide no evidence of any relevance whatever to a determination whether there existed a causal relationship between the allegedly stereotypical aspect of the remarks she relied on and the Policy Board's decision. Neither Dr. Fiske's testimony, nor any other evidence presented in this case, could reasonably support a finding that any single member of the Policy Board—let alone a majority of the Board's members—was influenced by the stereotypical rhetoric (if such it was) in which a very few partners

couched their remarks, rather than by the *facts* about Hopkins' behavior that so evidently underlay both those remarks and the many others before the Board—remarks made in evaluations of Hopkins' performance over the years as well as during the partnership evaluation process.

Even if the Court should someday hold that there are circumstances that justify a shifting of the burden of persuasion to the defendant in a Title VII case, no such circumstances existed here. If this case can be characterized as one involving "mixed motives," then virtually any other Title VII case could be so labeled, and the *Burdine* principle—squarely placing the burden on the plaintiff to prove discriminatory employment action—will simply disappear in a sea of findings of "mixed motives" that are totally lacking in concrete evidentiary support.<sup>23</sup> At a minimum, the Court should rule that a case may not be characterized as a "mixed motives" case for the purpose of placing the burden of persuasion on the defendant unless the trial court first finds that there is a substantial, concrete basis in the record to support the proposition that the legitimate reason for the employment decision established by the employer was a pretext under *Burdine*—that is, that it was not the "true reason" for the decision. When this standard is applied here, the conclusion is inescapable that the court of appeals improperly held that the burden of persuasion shifted to Price Waterhouse; and, accordingly, its judgment must be reversed.

<sup>23</sup> The Court may find a possible analogy here to the history and role of the "substantial evidence on the whole record" rule in administrative law, which derived from congressional dissatisfaction with the perceived tendency of some agencies to substitute expert intuitions, based on bits and pieces of evidence, for a fair appraisal of the evidence as a whole. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), and the discussion in Jaffe, *supra*, 69 Harv. L. Rev. 1020.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1988

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PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS, RESPONDENT

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

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**REPLY BRIEF FOR THE PETITIONER**

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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No. 87-1167

PRICE WATERHOUSE, PETITIONER

v.

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On Writ of Certiorari to the  
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---

**REPLY BRIEF FOR THE PETITIONER**

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What was the “true reason” for Price Waterhouse’s decision to place Ann Hopkins’ partnership candidacy on “hold”? Was it “*because of [her] \* \* \* sex,*” and thus in violation of Section 703(a)(1) of Title VII? That is, ultimately, the sole issue in this case.

Respondent and her amici seek to obscure the character of this issue, first, by giving misleading accounts of the facts and findings in this case, and, then, by bringing forward a confusing storm of new, distracting, and contradictory legal theories, all of them either wrong or inapposite to this case.

**I.**

A. Respondent attempts to picture this case as one where a brilliant employee, obviously entitled to partnership by all “objective” criteria, was in effect vetoed—“blocked”—by the sexist negative comments of a few partners who knew little of her or her work and whose opinions therefore clearly were based on discriminatory motives.

This is a false picture, completely at odds with the findings of the district court and with the undisputed



facts.<sup>1</sup> Hopkins' promotion was in no way "blocked" or "thwarted" by the negative views of a few partners who did not know her work and who submitted sexist reports. In fact, this entire picture of a "veto" system at Price Waterhouse is false. The decisionmaking process at Price Waterhouse involved an extensive evaluation by both the Admissions Committee and the Policy Board of Hopkins' *entire* record at the Firm, based on all available information. This included not only all of the written responses to the partnership "survey" about Hopkins' candidacy, but prior evaluations of her work and interviews with partners about the bases for their views of Hopkins. The totality of this information provided massive support for the district court's conclusion that Hopkins' "*conduct provided ample justification for the complaints that formed the basis of the Policy Board's decision*" (Pet. App. 46a-47a) (emphasis added). That information included facts—and misgivings based on those facts—furnished in long form reports by many of Hopkins' *supporters*. (Thus it was Thomas Beyer, Hopkins' chief sponsor, who wrote that Hopkins would "lose sensitivity for staff" (Def. Ex. 27), and who testified that he had already warned Hopkins that her harsh and unseemly behavior would jeopardize her partnership possibilities (see Pet. Br. 8).<sup>2</sup>

<sup>1</sup> Respondent's "colorization" of the facts is considerably abetted by her practice of imputing to the district court "findings" that the district court did not find. Thus, respondent says (Br. 7-8), "the district court accepted Hopkins' central argument: 'that she was not evaluated as a manager, but as a woman manager, based on a sexual stereotype that prompts [some] males to regard assertive behavior in women as being more offensive and intolerable than comparable behavior in men because some men do not regard it as appropriate feminine behavior' (Pet. App. 51a)." A glance at the cited portion of the district court's opinion will show, however, that the court was simply describing Hopkins' claims ("[s]he claims that she was not evaluated . . . [etc.]" (emphasis added) and not making findings at all.

<sup>2</sup> Another early supporter reported that Hopkins "can be abrasive, unduly harsh, difficult to work with &, as a result, causes significant

The information about Hopkins' character and performance furnished in the long form reports was entirely consistent with and confirmed the information derived from the short form reports and from the previous evaluations of Hopkins' work. It was not the views of a few ill-informed outsiders, but the *consensus* view, that there existed major shortcomings in Hopkins' ability to deal with co-workers and subordinates; it was this consensus that resulted in the fact that a detailed statistical profile derived from *all* the evaluations submitted by partners gave Hopkins low overall ratings for "tolerance," "sensitivity," "tact," "leadership," and "congeniality" (Def. Ex. 27; see Connor Dep. 31-33).<sup>3</sup> Indeed, evaluations by both the long and short form commenters, when summarized by the Admissions Committee in the statistical profile, showed that Hopkins ranked *second to last* of all candidates in her class in "personal attributes." Def. Ex. 35, 36.

Under these circumstances, it would not have been surprising had the Policy Board voted to reject Hopkins outright. Her candidacy was placed on hold only because the Chairman and Senior Partner of the Firm, Joseph Connor, decided "that [he] would push in the Policy

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turmoil" (Def. Ex. 27, Epelbaum). Other partners who had worked very closely with Hopkins noted that staff disliked working for her (*ibid.*, Statland and Coffey) and that she was "just plain rough on people" (*ibid.*, Coffey).

<sup>3</sup> We remind the Court that of the 32 partners who submitted evaluations of Hopkins, only 13 thought she should be made a partner. Eleven thought she should be rejected or held, and eight made no recommendation. Def. Ex. 27. We also note that of the 13 partners who recommended that Hopkins be admitted to the partnership, ten were short form commenters, while only three of the six partners who completed long form evaluations recommended her for partnership. Hopkins' suggestion (Br. 4-5) that her candidacy was "blocked" by the recommendations of the short form commenters is thus belied by the record; as Beyer, Hopkins' strongest supporter, testified, "[i]t's generally accepted in the firm that you need five, six favorable long form votes to be even seriously considered at the Admissions Committee level." Tr. 173.

Board's discussions for a hold and give her a chance to see if she could work on [interpersonal skills] and overcome some of these impediments" (Connor Dep. 30). Connor further testified that he "had some real trouble with the Policy Board because the record clearly justified a no." *Ibid.*

Respondent also conveys a distorted picture of the short form reports. These reports were filled out, not by partners who "barely knew" Hopkins (Resp. Br. 29) but by partners who had "*less than full time involvement*" with her (Connor Dep. 62).<sup>4</sup> Nor were these reports limited to conclusory (and supposedly sexist) adjectives ("hard-driving"; "aggressive"; "abrasive" (NOW Br. 6; Resp. Br. 9)); they were filled with specific information about the facts of Hopkins' inability to deal with staff. Partners noted that Hopkins "tended to alienate the staff in that she was extremely overbearing" toward them (Def. Ex. 27, Green), and that she lacked "leadership qualities" (*ibid.*, Wheaton) and might be unable "to develop & motivate [Price Waterhouse's] staff as a [partner]" (*ibid.*, Fridley). Others reported that staff and peer reaction to Hopkins was "uniformly *negative*" (*ibid.*, Docter), and that she was "universally disliked by the staff" (*ibid.*, Everett).

The fact is that the short form and long form reports, as well as the other evidence available to the Admissions Committee and the Policy Board—derived from Hopkins' supporters, opponents, and neutrals<sup>5</sup>—add up to a re-

<sup>4</sup> "Full-time involvement" with Hopkins by the relevant *partner* was of course not essential for reaching an informed view about Hopkins' staff relations. Managers and staff, many of whom had *extensive* dealings with Hopkins, would naturally report their problems with Hopkins to partners (see, e.g., Def. Ex. 27, Docter, reporting the "uniformly negative" input of "3-5 MAS [senior managers] who have worked with [Hopkins] extensively").

<sup>5</sup> The reports from partners who acknowledged that they did not have sufficient information to make an ultimate judgment about Hopkins' candidacy were also full of comments about the fact that she was "weak in interpersonal skills" (Def. Ex. 27, Johnson), "arrogan[t] & self-centered" (*ibid.*, Haller), and "extremely overbearing" (*ibid.*, Green).

markable congruity of opinion. Hopkins was an able and talented businesswoman,<sup>6</sup> whose performance at Price Waterhouse nevertheless was persistently marred by shortcomings in her ability to deal with co-workers (particularly subordinates). That is why the district court found that both "[s]upporters and opponents of her candidacy indicated that [Hopkins] was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff" (Pet. App. 43a-44a). Given these circumstances, and given the nature of the partnership relationship, it was eminently reasonable and responsible for the Policy Board to conclude that she should not be proposed for admission to the partnership at that time.

B. Even more unfair is respondent's persistent innuendo that the record shows that *opponents* of Hopkins' candidacy couched their opposition in terms that the district court found to be sexist, so that the "evidence" of "stereotyping" in this case related to the very persons in the firm who supposedly "blocked" her candidacy.

But as Judge Williams' dissent demonstrates in detail (see Pet. App. 29a-36a), all except *one* of the comments that could in the faintest way be characterized as overtly sexist (e.g., "a lady using foul language"; "macho"; "matured from a tough-talking, somewhat masculine hard-nosed mgr. to an authoritative, formidable, but much more appealing lady partner candidate") were made by partners who *supported* Hopkins' candidacy. (The one exception is the remark that Hopkins should take a

<sup>6</sup> Though Price Waterhouse did indeed assign Hopkins the task of drafting proposals that brought new work to the Firm, the suggestion that she singlehandedly captured \$30 to \$40 million in new business (NOW Br. 5) is silly. The massive proposals that generated these revenues were typically prepared over months and years by elaborate teams of Price Waterhouse managers and partners; as Hopkins herself testified, while she had been a contributor to successful proposals for new work, "[t]he entire team of people on all of the efforts that I worked on were [also] contributors" (Tr. 135).



"course at charm school," which was a passing phrase in a thoughtful comment opposing her candidacy; its weight as evidence of sexual discrimination is adequately disposed of by Judge Williams (see Pet. Br. 16 & n.4).)

There is, in sum, not a jot or tittle of support, either in the record or in the district court's findings, for respondent's claim that her candidacy was simply "blocked" by opponents who, although unfamiliar with her work, made negative recommendations on the basis of judgments that were shown to have been based on sexist stereotypes.

C. It is, of course, the case that Hopkins frequently was characterized by both opponents and supporters as aggressive, harsh, insensitive, and overbearing. It is the use of these general adjectives, in no way overtly sexist, that is seen by some of respondent's amici as reflecting the existence of sexual stereotyping at Price Waterhouse. But of course this creates a problem: what language is it permissible to use to describe a woman who is *in fact* aggressive, harsh, insensitive, and overbearing? If there exists a fair basis for concluding that there are *facts* to support these adjectives, should their mere use be denounced as a violation of Title VII—*without inquiry into the facts*?

With this question, we reach the problem of Dr. Fiske's testimony and its role in this case. Respondent's amici tilt with a straw man when they explain at great length that sexual stereotyping can and does exist and can and does lead to discrimination against women.<sup>7</sup> Of course that is the case. Nor do we doubt that good social science

<sup>7</sup> Hopkins and her amici rely on some of this Court's decisions condemning disparate treatment resulting from sex stereotypes (e.g., Resp. Br. 30, 46-47; NOW Br. 31-33). These cases involved facially discriminatory policies that were the product of stereotyped notions of the differences between men and women. See, e.g., *Mississippi University for Women v. Hogan*, 458 U.S. 718, 729 (1982) ("excluding males from [nursing school] tends to perpetuate the stereotyped view of nursing as an exclusively woman's job").

can help untangle difficult factual perplexities in discrimination cases.

The question here is the *particular* one, whether Dr. Fiske's *particular* testimony—which constituted a critical element in the district court's conclusion that Title VII was violated by unlawful "motivation" on the part of Price Waterhouse—was reasonably probative of that proposition—that is, whether it *was* valid social science to use Dr. Fiske's reasoning process as evidence of the fact that sexual discrimination tainted Price Waterhouse's decision *in this case*.

Our central submission is simple: it was illegitimate—and bad social science—for Dr. Fiske to conclude, and for the district court to accept Dr. Fiske's conclusion, that a discriminatory motive was shown to have existed in *this case* simply because words were used to characterize Hopkins that have been shown in *statistical samplings of other situations* to be associated with sexism.<sup>8</sup>

<sup>8</sup> This Court cannot be the arbiter of what is valid social science. But, in light of the claims made in some of the amicus briefs (particularly the brief of the American Psychological Association (APA)), we point out that Dr. Fiske's testimony in this case violated elementary principles of adequate methodology. See generally T. Cook & D. Campbell, *Quasi-Experimentation: Design & Analysis Issues for Field Settings* 37-95 (1979).

*First*, Dr. Fiske should have tested the "fit" of the terms used to describe Hopkins with the subject of analysis. See Cook & Campbell at 86. Dr. Fiske could have tested this fit either by asking former employees, co-workers, friends, and acquaintances to fill out evaluation forms similar to those used in the Price Waterhouse partnership selection process, or by actually interviewing Hopkins.

*Second*, when Dr. Fiske examined the records of other partnership candidates (J.A. 44), she should have conducted blind comparisons of those records with Hopkins' record in order to determine whether the terms used to describe Hopkins' interpersonal skills differed substantially from the terms used to describe the other candidates. See Cook & Campbell at 87. Had Dr. Fiske made these comparisons, she might well have come upon the evidence showing that interpersonal skills were a key consideration in the case of numerous male partnership candidates whom the firm decided to reject or to hold. See, e.g., Def. Ex. 64, Tab 5 (male candidate rejected because he "ranks relatively low among candidates in a



Simply put, “‘a study must rule out, or control for, competing hypotheses that may account for an observed state of affairs.’” (APA Br. 6 (citation omitted)). Dr. Fiske’s egregious error was her failure to rule out the possibility that Hopkins was indeed “abrasive,” “aggressive,” and “overbearing.”

If Dr. Fiske’s analysis is permitted to establish Title VII liability, no employer can deny a partnership to any woman with a harsh, overbearing, and insensitive per-

number of attributes including administration, communications, judgment, tact, congeniality and acceptance by associates/partners”; “[h]e has been described as boisterous, lacking in social tact and judgment, continually complaining, loud and abrasive, overbearing, opinionated”; *id.* at Tab 6 (male candidate placed on hold because short form evaluations characterized him as “‘not outgoing,’ ‘officious,’ ‘overbearing’”); *id.* at Tab 9 (male candidate placed on hold in part because he “is very aggressive and tough on staff”); *id.* at Tab 10 (male candidate rejected because “[h]is ability to deal with partners and staff is seriously impaired by personality attributes which are described as negative and abrasive”); *id.* at Tab 11 (rejected male candidate characterized as “immature, overbearing, gossipy and highly political in his business conduct”); *id.* at Tab 17 (male candidate placed on hold because he “has a tremendous ego and sometimes appears to be abrasive and brash”).

Third, Dr. Fiske made no attempt to test the question whether Price Waterhouse partners “matched” the samples employed in other sex stereotyping research. See Cook & Campbell at 42.

Cook and Campbell (the latter a past president of the American Psychological Association) are widely regarded as experts in the field of research design and the conduct of randomized experiments in field settings. See Glass & Asher, *Causation and Quasi-Experimental Design*, 25 Contemp. Psychology 772, 773 (1980). *Quasi-Experimentation* is about “drawing causal inferences in field research.” Glass & Asher at 774. The validity chapter is renowned for its “contribution to the methodology of the social sciences that is deep and penetrating; it is absolutely essential for advancing further our thinking on the methodology of empirical research.” *Id.* at 775. Scholars claim that Cook and Campbell’s work on analyzing research designs “gives all researchers a powerful language for assessing the strengths and weaknesses of their own research. Research professionals could hardly ask for much more in a single volume.” Hennessy, *The End of Methodology? A Review Essay on Evaluation Research Methods*, 35 W. Pol. Q. 606, 609 (1982).

sonality. For, as Judge Williams suggested, “no woman could be overbearing, arrogant or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping.” Pet. App. 36a (Williams, J., dissenting) (emphasis in original).

D. We add a word about the so-called “smoking gun”—Thomas Beyer’s remark, made *after* Hopkins’ partnership was placed on hold, that in his opinion she should act more femininely. Respondent places heavy reliance on the remark. Resp. Br. 8, 43-44. More astonishingly, the Solicitor General asserts that this remark, by itself, permissibly may serve as the basis of a future finding by the district court that the decision to postpone Hopkins’ partnership bid “was caused” by an unlawful motive. U.S. Br. 27.

Beyer made this remark to Hopkins *after* the Policy Board accepted the Admissions Committee’s recommendation to place Hopkins’ candidacy on hold. Beyer himself was, of course, not a member of either group. He was Hopkins’ strongest (and, therefore, obviously most disappointed) supporter. Can his inept post-hoc remark about how his protégé should behave in the future serve as *sufficient* evidence to support the conclusion that the *Policy Board’s* past decision was in fact tainted by discriminatory motives?

We suggest that the answer must be “no.” The reasons for the Policy Board’s decision were communicated to Hopkins by the Firm’s Chairman and Senior Partner at a meeting explicitly and especially dedicated to a discussion of the partnership decision and Hopkins’ future prospects (Tr. 87-95, 167; Connor Dep. 37-38, 53-62). Hopkins testified that none of the reasons mentioned at that meeting had anything to do with her sex (Tr. 95).

In light of this, the notion that Beyer had the “responsibility” for telling Hopkins why her candidacy had been postponed is simply an invention (and, as Judge Williams said below (Pet. App. 31a-32a), the district court’s casual aside to that effect (*id.* at 52a) was unsupported by

any breath of evidence). But in any event, to take Beyer's advice to Hopkins as itself constituting sufficient evidence that the members of the two relevant committees had *in fact* been motivated by illegal and obnoxious motives—in the face of overwhelming evidence that they had before them ample legitimate reasons to have misgivings about Hopkins' candidacy—would be unfair and misguided.

The Solicitor General's submission that the Beyer remark could by itself "support" a finding that the decision to put Hopkins on hold was "caused" by a discriminatory motive is an egregious example of the practice this Court rejected in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), when it stated that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." The law requires that there be "record evidence which provides a rational or logical basis for the finding and for the consequent presumption that the finding was in fact the product of reasoning from evidence. This must mean evidence *in the case and in the context of the case*." Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020, 1027 (1956) (emphasis in original). So in this case. To base a finding on a single item of evidence torn from the context of the case "is to imagine an abstract case, a case that was never tried." *Ibid.* Where the record presents undisputed and indisputable evidence that there existed a bona fide, nondiscriminatory basis for an employment decision, it is wholly illegitimate and unfair to suggest that that evidence should simply be overridden by an isolated incident consisting of an after-the-fact remark by Hopkins' mentor (himself not a decisionmaker) that—only by implication—attributes to the responsible actors a willingness to be influenced by impermissible and deplorable motives.

## II.

Perhaps the most remarkable aspect of the briefs submitted by respondent and her amici in this case is the speed and unanimity with which virtually everyone on

the scene has abandoned the court of appeals. Apparently it is now conceded on all sides (see, *e.g.*, Resp. Br. 35 n.20) that the court of appeals erred when it held that the burden of persuasion on the issue of liability shifts to the defendant in so-called "mixed motives" cases.<sup>9</sup>

Respondent and her amici attempt to salvage something from this admission of defeat by injecting into this case, at the eleventh hour, a confusing welter of new legal theories. But there is one unifying theme that underlies all of these theories: they are all designed to dilute—indeed, virtually to eliminate—the requirement that, in order for Hopkins to win her case, it must be found that she did not become a partner *because* of intentional discrimination. Causation has always been the key issue of fact in this case, and now respondent and her amici make it the key issue of law as well.

A. Having conceded that the court of appeals was in error in shifting the burden of persuasion to the defendant on the issue of liability, respondent and her amici defend the court of appeals' judgment by proposing a theory of liability for this case that would drain this concession of all significance. Specifically, they propose that Hopkins' burden consists, not of showing that her failure to be promoted was *caused* by unlawful discrimination, but merely of showing that the challenged employment decision was in some way "affected" by stereotypes.

What does it *mean*, that a decision was "affected" by—even though not caused by—discriminatory motives? This remains a mystery wrapped in an enigma. Its solution is not helped by the fact that respondent and her amici present divergent formulations as to how significant a "factor" discrimination must be.<sup>10</sup> Nor is it helped

<sup>9</sup> In a submission of profound obscurity, ~~respondent~~ argues (Br. 35 n.20) that the court of appeals' error in shifting the burden of proof to Price Waterhouse constituted a benefit to Price Waterhouse. We are unable to follow her reasoning.

<sup>10</sup> Hopkins and her amici use different definitions, agreeing only on the proposition that, whatever the label used, very little indeed



by respondent's explicit avowal (Br. 28) that the matter is not susceptible to "precise" formulation. In the end, respondent is forced to rest (Br. 29) with the district court's unhelpful formula: Title VII was violated because stereotyping supposedly played "an undefined role" in blocking Hopkins' admission to partnership.<sup>11</sup>

As we demonstrated in our opening brief, the language and legislative history of Title VII make it quite clear that, in an individual Title VII case involving disparate treatment, causation in fact is a necessary element of Title VII liability. To use the Solicitor General's words, causation is shown only if the discriminatory motive "was a *necessary* element in any set of factors that together was sufficient to produce the outcome" (U.S. Br. 13) (emphasis added).<sup>12</sup> Respondent and her amici ap-

need be shown before an employer may be adjudged a "proven wrongdoer" and hence found to have violated Title VII. See, e.g., Resp. Br. 31 (plaintiff's burden is merely to prove that "discrimination, affected an employment decision"); NOW Br. 36-37 (plaintiff need prove only that "sex is \* \* \* a factor in the employment decision") (emphasis in original); City Bar Br. 11 (liability is established if the plaintiff proves that the employment decision was "tainted by evaluations incorporating disappointed sex-role assumptions"); AFL-CIO Br. 26 (plaintiff need prove only "that sex \* \* \* played a negative role in the decisionmaking process concerning a term, condition, or privilege of employment").

<sup>11</sup> Of course respondent insists (Br. 29) that she is not talking about discrimination "in the air." But what exactly does it mean to say that unconscious sex stereotyping played an "unquantifiable" and "undefined" role in a decision that would, by hypothesis, have been the *same* even in the absence of stereotyping? If the discriminatory thoughts and feelings supposedly held by some Price Waterhouse partners in fact made no difference to the decision that was made, is it not, precisely, the mere existence of those thoughts and feelings that is made actionable?

<sup>12</sup> We hope that the Court will not follow the Solicitor General's further excursion (U.S. Br. 11-15) into the labyrinthine mysteries of causation at common law, and adopt his special (and not easily understood) gloss on causation that distinguishes between "but for" cause on the one hand and "sufficient" cause on the other.

The Solicitor General's category of "sufficient" cause was developed to deal with very specific and unusual tort problems. It is

parently concede that Hopkins has not made and cannot make this showing. But they come forward with no reason why this requirement—so plainly in the forefront of the minds of the eminently pragmatic lawyers who framed Title VII and so utterly conventional in the law—should be abandoned.<sup>13</sup>

manifestly out of place in the Title VII context. It covers the few bizarre cases where an event is produced by two physical causes each sufficient to produce a result (X shoots Y at the instant that Y is hit by lightning). Beyond this, the "sufficiency" standard is applied in cases involving *multiple, tortious* actions, each sufficient by itself to have caused the harm complained of, and none of which can be ruled out as the cause of the injury. See H.L.A. Hart & T. Honore, *Causation in the Law* 123-124 (2d ed. 1985); W. Prosser, *Law of Torts* 239 (4th ed. 1971). The plaintiff cannot prove in such a case that he would not have been injured "but for" the tortious conduct of any particular defendant. Hence some courts allow the plaintiff to prove liability in these circumstances merely by showing that the defendant's tortious actions were "sufficient" to have caused his injury. The policy behind this modification of the "but for" test is clear: When the wrongful act of each of two defendants is sufficient by itself to cause a plaintiff's harm, it is unfair to allow both defendants to escape liability simply because both did something that alone would have produced the harm. See W. Prosser, *supra*, at 239.

But this policy has no application whatever in the Title VII context. Transposed to so-called "mixed motives" Title VII cases, the "sufficiency" standard of causation would not ensure, as it does in its tort context, that an innocent plaintiff may recover from among various wrongdoers for his loss. Instead, it would operate to single out an illicit motive as a ground for liability for an employment decision that was perfectly *legitimate*. It thus would allow a Title VII plaintiff to succeed though she has suffered *no* harm at all as a result of discrimination—because her employer would have reached precisely the same decision for nondiscriminatory reasons.

<sup>13</sup> Respondent and her amici certainly win the prize for the biggest red herring of the year by arguing that Congress's intention to create Title VII liability without a showing of "but for" causation is demonstrated by its rejection of a statutory formula that would have restricted liability to cases where discrimination was the *only* or *sole* reason for an employment decision. *E.g.*, Resp. Br. 21; NOW Br. 42-43 & n.36. In fact, Price Waterhouse has never argued that Title VII liability requires such a showing. The "sole motive" issue is, in other words, a non-issue.



Substitution of any of the diluted formulae proposed by Hopkins and her amici for a requirement of causation in fact would invite a lawsuit for every errant manager's discriminatory thoughts or comments, regardless of whether those thoughts or comments (or, indeed, the manager) made any difference in the outcome of the employment decision. This is not what Title VII was intended to accomplish. It was not enacted to ban discriminatory feelings or expressions, by employers or anyone else. Instead, it requires that the employer "must do or fail to do something in regard to employment \* \* \* because of" some discriminatory motive. 110 Cong. Rec. 7254 (1964) (emphasis added). Only insistence that a Title VII plaintiff establish the usual standard of causation, by proving that the employer would have reached a different decision "but for" discrimination, can ensure that the statute is not turned into a "thought control" bill. *Ibid.*; see U.S. Br. 9, 25.<sup>14</sup>

<sup>14</sup> Amicus AFL-CIO argues (Br. 10-14) that causation in fact must be abandoned in individual disparate treatment cases such as Hopkins' because, otherwise, Title VII would leave it open to employers to maintain systemic employment practices that discriminate against women (even though no individual employment decision can be shown to have been caused by discrimination). But this concern is misplaced. Title VII provides ample remedies for eliminating such practices without a requirement of "but for" causation.

First, Section 703(a)(2) outlaws such practices by making it unlawful for an employer "to limit, segregate, or classify his employees \* \* \* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of" an impermissible reason. A sexually biased promotion *system* obviously would "tend" to limit employment opportunities by "segregating" and "classifying" employees on impermissible grounds; and an attack under Section 703(a)(2) would not have to depend on a showing that a particular woman actually would have been hired or promoted but for her sex.

Second, facially discriminatory policies may be actionable in class action disparate treatment cases brought under Section 703(a)(1). Where, in such cases, the allegation is that the employer, rather than being guilty of a particular decision not to hire or

B. Unable to make the required showing of causation, Hopkins has virtually abandoned her original contention that Price Waterhouse violated Section 703(a)(1) when it declined to make her a partner. Instead, she argues for the first time in her brief to this Court that she proved a violation of Section 703(a)(2). Resp. Br. 20-22; see also AFL-CIO Br. 11-13.

But it is much too late for Hopkins to claim that Price Waterhouse violated Section 703(a)(2) because random manifestations of sexual stereotyping made an appearance in the comments of some of her evaluators (none of them actual decisionmakers in her case). No such theory was tried by the district court, and no review of it was attempted by either the district court or the court of appeals. Hopkins' case was brought, tried, and appealed on the claim that the *particular* decision not to promote her at that time was made "because of" her sex and thus violated Section 703(a)(1) of Title VII. The distract court expressly found that Hopkins' evidence failed to prove "the substantial statistical disparity ordinarily required to show that a subjective evaluation process produces a discriminatory disparate impact" (Pet. App. 59a n.16). No serious and focused inquiry was ever made in this case as to whether stereotyping was such a *general* or *structural* aspect of Price Waterhouse's partnership system that it "classified" or "segregated" em-

promote on account of sex, is guilty of discriminating against a class in the terms, conditions, or privileges of employment, the case may be conceived of as the functional equivalent of a Section 703(a)(2) case (although presumably at least one member of this class would have to show some specific injury in order to create Article III jurisdiction). (But of course Hopkins did not bring a class action; her suit alleged that *she* was not promoted "because of" her sex.)

Finally, the government may challenge such practices in "pattern-or-practice" cases brought under Section 707(a). If the government proves the existence of a pattern or practice, prospective relief may be appropriate, even though additional proceedings would be required to determine the scope of individual relief. *Teamsters v. United States*, 431 U.S. 324, 361 (1977).

ployees in violation of Section 703(a)(2). Under these circumstances, no violation of Section 703(a)(2) can be deemed to have been shown.

In any event, Hopkins' eleventh-hour theory confounds and confuses two different sorts of Title VII cases. Under her new approach, every Section 703(a)(1) violation automatically would violate Section 703(a)(2), leaving no independent scope for the former section at all. Section 703(a)(2)—whose principal function is to deal with cases of disparate impact, not disparate treatment<sup>15</sup>—is violated, not by individual, one-shot employment decisions, but by systemic employment practices that disfavor, or tend to disfavor, women. *Per contra*, systemic practices and classifications that disfavor women, but cannot be shown to have caused a particular employment decision, can violate Section 703(a)(2), but are not actionable in an individual disparate treatment case under Section 703(a)(1).

In fact, Hopkins' reliance on Section 703(a)(2) at this late hour is simply a desperate attempt to find shelter under a statutory provision that does not condition liability on proof of a causal link between a challenged employment policy and an individual employment decision—

<sup>15</sup> Disparate impact cases "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on" women or minorities. *Teamsters*, 431 U.S. at 336 n.15. See also *Watson v. Fort Worth Bank & Trust Co.*, No. 86-6139 (June 29, 1988), slip op. 10 (Section 703(a)(2) prohibits the use of a "system of \* \* \* decisionmaking" that has a disparate impact).

Plaintiffs alleging disparate impact need not prove that the challenged policy was the "but for" cause of any particular employment decision in order to establish liability. This is because it is the maintenance of a policy that has an unnecessarily disparate impact that violates Title VII. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-432 (1971). But Hopkins' case is *not* a disparate impact case. She is an individual plaintiff alleging disparate treatment. As such, she is not relieved of the duty of proving that her partnership bid was placed on hold "because of" intentional discrimination.

and thereby to head off the conclusion "that *all* Title VII disparate treatment cases should be resolved under the *McDonnell Douglas/Burdine* framework" (U.S. Br. 18) (emphasis in original), with its requirement that plaintiff prove that she was the victim of intentional discrimination. While it is true that the *McDonnell Douglas/Burdine* framework does not apply to Section 703(a)(2) claims, it is also true that Section 703(a)(2) has no relevance to Hopkins' case.

C. The final prong of respondent's attack on the requirement of causation depends on the rigid and artificial distinction she draws between the issues of liability and remedy under Title VII. More specifically, she argues (Br. 31-32) that the special emphasis on the requirement of causation in Section 706(g) of Title VII is rigidly limited to that section and its specific limitation of "make whole" remedies such as reinstatement and back pay. From this she proceeds to the conclusion (Br. 32-33) that "causation" is relevant *only* to the remedial phase of the case—(one where the cards have, of course, already been carefully stacked against the employer because of a shift in the burden of proof). Indeed, Congress's specification of the requirement of cause in Section 706(g) is used to support the negative inference that Congress was indifferent to the requirement of cause in Section 703(a)(1).

Respondent is wrong. Section 706(g) does not exist in a hermetically sealed universe, and its policies are not at all irrelevant to questions of liability. It is, of course, true that the requirement of "cause" specified in Section 706(g) does play an independent role in those cases where liability may be established without a showing of causation—for example, class actions brought under Section 703(a)(1), discriminatory "practices" cases brought under Section 703(a)(2), and pattern-or-practice cases brought by the government under Section 707(a). Section 706(g) assures that in such cases relief will be limited to a declaration or perhaps an injunction, and will not include reinstatement and back pay for persons who



were not in fact the victims of discrimination.<sup>16</sup> But the fact that Section 706(g) plays this independent role in cases where causation is not required to establish liability does not mean that the congressional purpose expressed in Section 706(g) is irrelevant to problems of liability. Still less does it support the negative-spin inference that Congress intended to dispense with requirements of causation in the liability aspect of all Title VII cases.

In fact, the legislative history of Section 706(g) establishes without doubt that the overriding purpose of the particular language specifying that certain forms of remedy are prohibited where the employer acts for "any reason *other than*" a prohibited reason was to *integrate the remedial provision with what was assumed to be the fundamental policy of the liability sections*. As Representative Celler said, "the purpose of the amendment is to specify cause." "[T]he court, for example, cannot find *any violation* of the act which is based on facts other" than discrimination. 110 Cong. Rec. 2567 (1964) (emphasis added). Representative Gill said that the Congress wished to "pinch down" orders under this act and that "we would limit orders under this act to the purposes of this act." *Id.* at 2570 (emphasis added). These authoritative expressions are completely inconsistent with the notion that "cause" was to be deemed important *only* in connection with the secondary remedial aspects of the case (where its meaning would in addition be wholly diluted by respondent's contention that, in this remedial

<sup>16</sup> See *Teamsters*, 431 U.S. at 359 (proof of discrimination against a class of persons can do no more than "ma[ke] out a prima facie case of discrimination against the individual class members"). It is revealing that, virtually without exception, the cases that Hopkins uses to illustrate the claim that the "cause" requirement of Section 706(g) is irrelevant to questions of liability under Section 703(a)(1) are decisions in class actions. See Resp. Br. 31-33. See also U.S. Br. 21-24 (citing class action precedents, and decisions from outside the Title VII area that we have shown to have no relevance to this case (Pet. Br. 33 n.14)).

phase, the employer must carry the burden of persuasion).

### CONCLUSION

Respondent's strategy in this case is plain. Under her theory, Hopkins has the burden of persuasion, but need not establish causation—she carries her burden by showing that a discriminatory thought or comment was sufficiently "in the air" that it may have played an "undefined" role in an employment decision. (This is, functionally, no more than the equivalent of the *first* stage ("prima facie" case) of the *Burdine* framework. Indeed, respondent's theory of Title VII is simply an elaborate way to jettison from the law *Burdine's* third stage—the requirement that plaintiff show that the valid reason demonstrated by the employer was not the "true" reason.) Having shown, on the basis of this flimsy threshold requirement, that defendant is a "wrongdoer" (Br. 33), respondent has set the stage for the next move—the shift to the employer of the burden of persuasion (indeed, by a "clear and convincing" showing) on the issue of remedy. The upshot is a stacking of the deck that would make it virtually impossible for an employer to establish that the "true" reason for its decision was not discrimination.

Hopkins now agrees with us that the court of appeals erred by requiring Price Waterhouse to bear the burden of persuasion at the liability stage of the case. The issue thus boils down to the *standard* that she must meet to show that the decision to postpone partnership in her case was "because of" her sex. As we demonstrated in our opening brief, and again here, adoption of any standard other than the traditional "but for" test is inconsistent with the language and purposes of Title VII. This being so, the *McDonnell Douglas/Burdine* framework, which exists only to facilitate inquiry into the plaintiff's ultimate burden of proving that she was "the victim of intentional discrimination," *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981), clearly applies in this individual disparate treatment



case; and the court of appeals' abandonment of that framework was plainly in error. Having failed to prove that she would have been made a partner in the absence of discrimination and that the valid reason shown by Price Waterhouse for its decision was not the "true reason," it follows that Hopkins has simply been unable to establish that she was in fact "the victim of intentional discrimination."

For the foregoing reasons, as well as those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA**

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## QUESTIONS PRESENTED

1. Whether, in order to establish a violation of Title VII, a plaintiff must prove not only that she was the victim of prohibited discrimination but also that the challenged employment decision would have been made in her favor in the absence of discrimination.

2. Whether a proven violator of Title VII may avoid a grant of specific relief to the injured employee unless it proves by evidence of a clear and convincing character that it would have taken the same employment action in any event for a separate lawful reason.

3. Whether it was clearly erroneous for the district court below to find that petitioner's denial of partnership to respondent was caused, in part, by her sex.



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Prather, <i>Why Can't Women Be More Like Men: A Summary of the Sociopsychological Factors Hindering Women's Advancement in the Professions</i> , 15 American Behavioral Scientist 172 (1971) .....	31



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

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No. 87-1167

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PRICE WATERHOUSE,

v.

*Petitioner*

ANN B. HOPKINS,

*Respondent*

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On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit

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**BRIEF FOR RESPONDENT**

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**STATEMENT**

1. *Introduction.* Ann Hopkins proved that Price Waterhouse's rejection of her candidacy for partnership was caused, at least in part, by discrimination based on sex. In statutory terms, she proved that Price Waterhouse limited her chances for advancement by utilizing a partnership admissions process that "tend[ed] to deprive" her of employment opportunities because of her sex. *See* 42 U.S.C. § 2000e-2(a)(2). The central question in this case is whether Hopkins had to prove anything more than this in order to establish a violation of Title VII—specifically whether (as petitioner contends) Hopkins had the additional burden of proving that she would have become a partner in the absence of discrimination.

Acceptance of petitioner's contention—which was rejected by the courts below—would result in a significant erosion of Title VII's protections. This is not what the

statute says, it is not what Congress intended when it wrote the law, and it is inconsistent with the decisions of this Court in related areas.

2. *Hopkins' Credentials.* Price Waterhouse engages in accounting and management consulting in 90 offices across the United States. Organized as a partnership, the firm had 662 partners at the time this litigation began, of whom just seven were women. Ann Hopkins was a senior manager in Price Waterhouse's Office of Government Services in Washington, D.C., which specialized in securing and managing contracts with Federal agencies. Hopkins herself specialized in the application of computer-based technology to large information systems, and she was a stellar performer. She was instrumental in securing \$34-\$44 million in new business for Price Waterhouse, including contracts with the Departments of State and Agriculture, and she effectively managed the resulting engagements.

The district court found that Hopkins' "clients appear to have been very pleased with her work" (Petitioner's Appendix, hereafter "Pet. App.," 43a), and the record supports this. At trial, two senior Department of State officials, both at the Assistant Secretary level, testified for Hopkins. The Comptroller of the Department termed her performance "excellent" and said that she was "extremely competent, intelligent . . . strong and forthright, very productive, energetic and creative"—and that she had a sense of humor, too (Tr. 148, 150). The Assistant Secretary for Administration and Security agreed and said that he particularly prized Hopkins' "intellectual clarity"; he also said that he had tried to hire her to work at State (Tr. 156-57).

In the summer of 1982, the Office of Government Services nominated Hopkins for partnership in Price Waterhouse. Nomination is the first step in a complex admissions process that occurs annually and is about nine months in length. Scores of candidates are nominated

each year, and there is no ceiling on the number admitted. Hopkins was one of 88 candidates under consideration in the 1982-83 admissions cycle; the other 87 were men. She had brought in more new business than any of the men; indeed, none of the male nominees even approached the amount of business that she had generated. She had also billed more hours than any of the men (Pet. App. 4a). Her office's endorsement, which accompanied her nomination, said that

Ann Hopkins performed virtually at the partner level for the U.S. State Department. While many partners were "involved" with the client, State Department officials viewed Ann as *the* project manager . . .

\* \* \* \*

In her five years with the firm, she has demonstrated conclusively that she has the capacity and capability to contribute significantly to the growth and profitability of the firm. Her strong character, independence and integrity are well recognized by her clients and peers. Ms. Hopkins has outstanding oral and written communication skills. She has a good business sense, an ability to grasp and handle quickly the most complex issues, and strong leadership qualities.

(Pl. Ex. 15; emphasis in original.)

In April 1983 Price Waterhouse admitted 47 of the 88 candidates. Hopkins was not among them; instead she was placed on "hold," which meant that she was eligible for future consideration, assuming renomination by her office. Later, after again being passed over for partnership, she left Price Waterhouse and filed an administrative charge of sex discrimination that culminated in this Title VII litigation.<sup>1</sup>

<sup>1</sup> It is the first rejection for partnership that is the subject of this petition. Hopkins was passed over the second time because two partners in her own office opposed her candidacy and the office therefore declined to renominate her. Unanimity is not required for a nomination, and a male candidate from St. Louis had been

3. *The Partnership Admissions Process.* Price Waterhouse's rejection of Ann Hopkins' candidacy for partnership was the product of a unique collegial decision-making process. The process begins with nomination of candidates by local offices. Thereafter any of the firm's partners, wherever located, may submit written comments on nominees (either "long form" or "short form," depending on how well a partner knows a particular candidate). In practice few partners submit comments. An Admissions Committee then considers the partners' written remarks as well as other comments—formal and informal—obtained during office visits and makes a recommendation to the Policy Board, the firm's governing body. The Policy Board makes the final decision on whether to admit a nominee to partnership.

As is apparent, there are many places in the admissions process where the final decision can be influenced—and hence where discrimination can affect the decision. Price Waterhouse pays especially close attention to negative comments about a candidate, and strong opposition by even a few partners may be sufficient to scuttle a candidacy. That is what happened to Ann Hopkins. The decision about her was made collectively, and a large number of men had a hand in it, including the members of the Admissions Committee and Policy Board. Even so, less than five per cent of Price Waterhouse's partners submitted written comments on Hopkins. Many of these were strong supporters. It was the negative comments of fewer than ten partners that blocked her admission.

Opponents focused not on Hopkins' objective qualifications—these were unquestioned—but rather on her "interpersonal skills." And as the district court found, most

nominated and admitted over the opposition of at least three partners in his office (Pl. Ex. 20). Given the difficulties that Hopkins had earlier encountered, however, the partners in her office believed that unanimity was needed for renomination, because "[w]ithout strong support within [her] office, it was felt that her candidacy could not possibly be successful" (Pet. App. 44a).

of the opposition appeared in "short form" comments from partners who had "limited contact" with her (Pet. App. 44a). Nevertheless, these comments were "determinative" (*id.*), because "the firm's evaluation process gave substantial weight" to the negative views (Pet. App. 58a). Put another way, "[t]he Policy Board gave great weight to the negative views of individuals who had very little contact" with Hopkins (Pet. App. 55a). Joseph Connor, the firm's Senior Partner and Chairman of its Policy Board, confirmed this, saying that "those who had less than full time involvement with Ann, were in effect the deciders on this one."<sup>2</sup>

Since Price Waterhouse acknowledged—and the district court found—that Hopkins' admission to partnership was thwarted by the views of a few men who did not know her well, the issue for Title VII purposes was whether the expression of these views was the product of sex discrimination. The question was not whether Hopkins was perfect in every respect; the court observed that her conduct provided "ample justification" for complaints about her (Pet. App. 47a). The inquiry, however, did not end there. For the issue was not whether there were grounds for concern but instead whether concern would have been expressed in the same fashion—and with the same degree of intensity—about a man.<sup>3</sup>

<sup>2</sup> J. Connor deposition 62. Mr. Connor's videotaped deposition was played at trial and is part of the record in this case (see R. 34 and Tr. 234-36).

<sup>3</sup> In its brief, petitioner dredges up every unflattering comment ever made about Hopkins and presents these in a one-sided fashion. Many of these concerned events early in her career at Price Waterhouse, i.e., before the summer of 1981 (Tr. 203); Thomas Beyer, the head of her office, said she "responded well" to discussions about these matters, so there was "no question . . . that Ann Hopkins was a valid partner candidate" at the time she was nominated in 1982 (Tr. 204). Indeed, virtually everyone who worked with Hopkins for any period of time admired and respected her. Thus three high level professionals who had served on her staff—a man and two women—testified on her behalf. All three said that she was demanding but fair (including the individual who remarked



Here it is significant that negative comments about interpersonal skills were commonplace in the admissions process at Price Waterhouse but did not necessarily prove fatal for male candidates. For example, in 1982 the Policy Board considered a man who conveyed the image of a "Marine drill sergeant" and who was said to be "crude, crass, etc." (Tr. 286-87). Joseph Connor acknowledged that this candidate's manner and style raised serious problems. Yet a member of the Policy Board defended the candidate, saying that "[h]e is a man's man; he is very direct," and the Board decided to admit him (*id.*; Pl. Ex. 20). A year later, at the same time that Hopkins was being considered, the Admissions Committee noted that another candidate was

aggressive and self confident. It is apparent that he has, at times, carried these traits to excess with the result that a number of partners comment on him in such terms as "lacking maturity," "wise-guy attitude," "headstrong," "abrasive and overbearing" and "cocky." The . . . partners rate him relatively low in the managerial skills and personal attributes categories as a result of these traits.

(Pl. Ex. 25.) The Policy Board decided to admit this candidate, too. And when the Chairman of the Admissions Committee was asked at trial whether still other men had become partners despite concerns about their interpersonal skills, he responded, "Oh, yes" (Tr. 292).

about "diplomacy, patience and guts"), and all three said that they would like to work with her again (Tr. 417-440). Moreover, when Hopkins was assigned responsibility for managing her office's Word Processing Department in 1982, she performed better than the two partners who preceded her; Mr. Beyer said that this was because "she addressed the personal problems of people on the staff," which was "one of the first times . . . someone at that level, partner or manager . . . [got] involved with the people themselves" (Tr. 208-211). The point here is that the situation was much more complex and ambiguous than petitioner asserts. For this reason it was essential to inquire—as the district court did—whether Hopkins' sex contributed to the manner and intensity of the concerns expressed about her during the admissions process.

This did not mean that the men admitted despite these concerns were situated similarly to Hopkins; indeed the district court found otherwise. But this evidence did show that a perceived problem with interpersonal skills was not necessarily sufficient to defeat a candidacy. What was important was whether that concern was translated into strong opposition by some of the partners—as with Hopkins—or into mild criticism or even approbation ("[h]e is a man's man").

4. *The Decision of the District Court.* Hopkins alleged that she was denied partnership because of her sex, in violation of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* In determining whether the Act was violated, the district court separately considered three arguments, although it called them "closely interrelated" (Pet. App. 45a).

As noted above, the court did not find that concerns about Hopkins' interpersonal skills were groundless. Nor, as also noted, did the court find that liability could be established simply through a comparison between Hopkins and men who were admitted as partners despite concerns about their personalities. This was because the men and Hopkins were not similarly situated in all material respects. For example, some of the men were from other offices and had skills for which Price Waterhouse had special need, so that a special "business decision" was made to admit them. In addition, they had received fewer "no" votes, and the negative comments about them were "less intense" than those directed at Hopkins (Pet. App. 49a).

Petitioner trumpets these findings, but they did not resolve the vital question of whether the negative comments about Hopkins—and their intensity—resulted from sex discrimination. This was pivotal, since it was undisputed that Hopkins' candidacy was blocked by the negative views of partners who did not know her well. Addressing this point, the district court accepted Hopkins' central argument: "that she was not evaluated as

a manager, but as a woman manager, based on a sexual stereotype that prompts [some] males to regard assertive behavior in women as being more offensive and intolerable than comparable behavior in men because some men do not regard it as appropriate feminine behavior" (Pet. App. 51a).

The court detailed the evidence supporting this conclusion, including what the dissent below called a "smoking gun" (Pet. App. 31a): After Hopkins learned in the spring of 1983 that she had not been chosen as a partner, she discussed her chances for future selection with Thomas Beyer. Beyer was the partner-in-charge of her office and an ardent supporter, and the district court found that he was "responsible for telling [Hopkins] what problems the Policy Board had identified with her candidacy." Beyer advised her to

walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.

(Pet. App. 52a.)

Petitioner has tried throughout this litigation to downplay the significance of this evidence, but it was telling in its own right and was also consistent with the other proof of a double standard. For example, the district court found that Hopkins' "[s]upporters indicated that her critics judged her harshly due to her sex" (Pet. App. 51a), and the Policy Board's decision on Hopkins recited that she had a "lot of talent" but needed "social grace" (Pet. App. 7a).

The court also considered the testimony of Dr. Susan Fiske, a "well qualified expert" whose credentials were not challenged by petitioner at trial (Joint Appendix, hereafter "J.A.," 25). As the court found,

Dr. Fiske testified that situations, like that at Price Waterhouse, in which men evaluate women based on limited contact with the individual in a traditionally male profession and a male working environment

foster stereotyping. One common form of stereotyping is that women engaged in assertive behavior are judged more critically because aggressive conduct is viewed as a masculine characteristic.

(Pet. App. 54a.)

In particular, Dr. Fiske testified that a well developed body of research documents the fact that certain conditions encourage stereotyping based on sex, that all these conditions were present at Price Waterhouse in the decisionmaking process on Hopkins' candidacy, and that the pattern of comments on Hopkins was consistent with the existence of stereotyping. Dr. Fiske concluded "with reasonable certainty" that sexual stereotyping played a "major determining role" in the decision about Hopkins (J.A. 28-29).

According to Dr. Fiske, conditions that foster stereotyping include "rarity"—the presence of only one or a handful of women in the group being evaluated—and the use of criteria and sources of information that are ambiguous. In Hopkins' situation rarity was easily established—she was the only woman among 88 candidates in the partnership pool—and the criteria relating to interpersonal skills (as opposed, say, to business generation) were ambiguous. In addition, the source of much information was also suspect, since many of the comments were based "on the briefest of encounters" with Hopkins (J.A. 33).<sup>4</sup> Analysis of the comments showed that Hopkins was specifically advised to behave more like a woman, and that conduct seen as "outspoken" or "independent" by her supporters became "overbearing" or "abrasive" when viewed by her opponents: "I see a very striking contrast in the way the same behavior gets framed" (J.A. 61). Dr. Fiske pointed out that the view of a forceful woman as abrasive is consistent with attitudes grounded on stereotypes (J.A. 30-31). She also

<sup>4</sup> This observation is in line with the district court's finding that Hopkins' candidacy was blocked by those who did not know her well (see text accompanying n.2, *supra*).



pointed to the extreme intensity of much of the opposition to Hopkins and said that this was likewise characteristic of stereotyping, particularly when voiced by those who did not know her well, *e.g.*, one partner calling Hopkins "potentially dangerous," another referring to her as "universally disliked" even though she had many strong supporters (J.A. 39, 60, 66).

Dr. Fiske's conclusion that sexual stereotyping played a major role in the decision on Hopkins was based not only on partners' evaluations but on the "convergence of . . . indicators" of stereotyping (J.A. 56):

I drew the conclusion based on rather strong antecedent conditions, having somebody who was in an extreme minority condition, ambiguous criteria and ambiguous information[,] and there seemed to me what I call several converging indicators which included the categorical things, trying to get her to do things in a more feminine fashion. Charm school. Needs more social grace to overcompensate for being a woman. Those are comments that talk about behavior in light of her gender, her sex specifically. The overly intense negativity and the divided opinion that resulted from that, those are all factors that—all indicators that as a group, you know, contributed to my conclusion about the case.

(J.A. 76-77.)<sup>5</sup>

In addition to examining Price Waterhouse's treatment of Hopkins, the district court also found that other women had been rejected on similar grounds, *i.e.*, "because partners believed that they were curt, brusque and abrasive, acted like 'Ma Barker' or tried to be 'one of the boys'" (Pet. App. 52a). And the court found that one partner had "repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable

<sup>5</sup> Dr. Fiske's testimony was not idiosyncratic or based on her own subjective judgment. Instead her approach was entirely consistent with the consensus of researchers in her field. See generally the Brief for *Amicus Curiae* American Psychological Association.

of functioning as senior managers—yet the firm took no action to discourage his comments" (*id.*).

Based on its assessment of all the evidence, the district court found that "stereotyping played an undefined role in blocking [Hopkins'] admission to the partnership in this instance" (Pet. App. 54a). The court indicated that this was unconscious on the part of individual evaluators but carried the analysis "one step further" and surveyed the evidence showing that the Policy Board ignored "clear indications" of "discriminatory stereotyping" in the partnership admissions process (Pet. App. 55a). The court then found that:

Although the stereotyping by individual partners may have been unconscious on their part, the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole.

(Pet. App. 56a.)

This was unlawful, since "[a] female cannot be excluded from a partnership dominated by males if a sexual bias plays a part in the decision and the employer is aware that such bias played a part in the exclusion decision" (*id.*). The court summarized its findings as follows:

Comments influenced by sex stereotypes were made by partners; the firm's evaluation process gave substantial weight to these comments; and the partnership failed to address the conspicuous problem of stereotyping in partnership evaluations. While these three factors might have been innocent alone, they combined to produce discrimination in the case of this plaintiff. The Court finds that the Policy Board's decision not to admit the plaintiff to partnership was tainted by discriminatory evaluations that were the direct result of its failure to address the evident problem of sexual stereotyping in partners' evaluations.

(Pet. App. 58a-59a.)



Having found a violation of Title VII, the district court turned to relief.<sup>6</sup> The court termed the decision on Hopkins a "mixture of legitimate and discriminatory considerations" and noted that it could not say that she would have become a partner in the absence of discrimination (Pet. App. 59a). But after a violation had been established, the burden was on Price Waterhouse, because "once a plaintiff proves that sex discrimination played a role in an employment decision, the plaintiff is entitled to relief unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination" (*id.*). The court explained that, "[w]here sex discrimination is present, even if a promotion decision is a mixture of legitimate and discriminatory considerations, uncertainties must be resolved against the employer so that the remedial purposes of Title VII will not be thwarted by saddling an individual subject to discrimination with an impossible burden of proof" (Pet. App. 59a-60a). The court found that petitioner had not carried its burden (*id.*).<sup>7</sup>

5. *The Decision of the Court of Appeals.* The court of appeals affirmed the determination that Title VII had been violated. The court said that "Hopkins demonstrated, and the District Court found, that she was treated less favorably than male candidates because of her sex" (Pet. App. 19a). That is, she had shown that "her gender was a significant motivating factor in her failure to make partner" (Pet. App. 22a). The evidence noted by the court of appeals on this point consisted of

<sup>6</sup> This portion of the court's opinion is captioned "Remedy" (Pet. App. 59a).

<sup>7</sup> Ultimately the court declined to award specific relief on grounds unrelated to this petition: that Hopkins had not proved constructive discharge and had failed to present adequate proof on damages. The court of appeals reversed this aspect of the trial court's decision and remanded for entry of "full relief" (Pet. App. 28a). The propriety of this ruling is not an issue here.

the comments made by the partners about Hopkins,<sup>8</sup> the expert testimony, and comments made about other women candidates in prior years. Citing *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), the court rejected Price Waterhouse's "piecemeal attack on the District Court's finding, . . . [which] ignores the fact that we must view the evidence in its entirety, and is in any event unequal to the task of demonstrating that the court's finding is clearly erroneous" (Pet. App. 12a).

The court of appeals understood that the record also contained, as the trial court had found, other reasons for concern about Hopkins. Thus this was a "case of mixed-motivation," since the district court had found that both lawful and unlawful motives "were significant factors in the firm's decision" on Hopkins (Pet. App. 25a).

Given this, the court of appeals held that Price Waterhouse could avoid a liability determination only by proving that "impermissible bias was not the determinative factor" in the decision on Hopkins (*id.*). The court said that such a showing must be made by clear and convincing evidence and noted that petitioner had not made it. Hence the court ruled that a violation had been established (*id.*).

In his dissent, Judge Williams had "no quarrel" with the principle that "a party acting with one permissible motive and one unlawful one may prevail only by affirmatively proving that it would have acted as it did even if the forbidden motive were absent" (Pet. App. 38a). He believed, however, that there was insufficient evidence to support a finding that Hopkins' rejection was caused, even in part, by discrimination; *i.e.*, he felt that sexual

<sup>8</sup> These included various descriptions of Hopkins—from supporters as well as opponents—as "macho," "a somewhat masculine hard-nosed" manager, one who "overcompensated for being a woman," who needed a "course at charm school" (Pet. App. 12a-13a). Here the court saw as "[p]erhaps most telling . . . Price Waterhouse's desperate attempt to erase from the record Thomas Beyer's advice to Hopkins" to behave "more femininely" (Pet. App. 13a-14a).

stereotyping was “not plausibly related to the decision” on her candidacy (Pet. App. 39a).

In making this argument on insufficiency of evidence, Judge Williams tried to neutralize what he termed the “smoking gun”—Thomas Beyer’s advice to Hopkins to behave more femininely (Pet. App. 31a). And on this point, he could only assert that the district court was “clearly erroneous” in finding that Beyer was speaking for the firm, *i.e.*, “in fulfillment of his ‘responsib[ility] for telling [Hopkins] what problems the Policy Board had identified with her candidacy’” (*Id.*). Judge Williams’ discussion of clear error did not mention either Rule 52, Fed. R. Civ. P., or this Court’s treatment of the rule in the Title VII context in *Anderson v. City of Bessemer*, 470 U.S. 564.

#### SUMMARY OF ARGUMENT

Violation and remedy are separate matters under Title VII. *Fadhl v. City & County of San Francisco*, 741 F.2d 1163 (9th Cir. 1984). The initial question in any Title VII case—and the one on which the plaintiff at all times bears the burden of persuasion—is whether there has been a violation of the Act. Once a violation has been established, however, the employer has the opportunity to attempt to limit relief by proving that the challenged decision would have been the same even in the absence of discrimination. See 42 U.S.C. § 2000e-5(g). That is, after a violation has been proved, the burden of proof shifts to the employer to try to narrow the remedy due the plaintiff. The district court correctly applied these principles in finding that Price Waterhouse violated Title VII when it rejected Ann Hopkins’ candidacy for partnership.

1. Some Title VII cases are amenable to binary analysis, and the trier of fact can determine that unlawful discrimination either was or was not the motivation for a particular employment decision. If it was, a violation is unquestionably established.

But sometimes the trier of fact may determine after reviewing the evidence that both lawful and unlawful motives contributed to a decision—that, as here, the “decision is a mixture of legitimate and discriminatory considerations” (Pet. App. 59a). In such a case, what happens if the plaintiff has not shown, in addition, that the challenged decision would have been made in his favor in a bias-free environment? Is a violation also established here?

Petitioner says no, but this is wrong. The plaintiff’s burden of proving a Title VII violation is satisfied by showing that an unlawful factor contributed to an employment decision, even if lawful factors may also have been present. It would be “destructive of the purposes of [the Act] to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor.” *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983). Such a requirement would also run counter to the statutory language, Title VII’s history and the decisions of this Court in related contexts. (Our position on these points is in many respects similar to that of the Solicitor General; see Brief for United States.)

Title VII’s prohibitions on employer conduct are set forth in Sections 703(a)(1) and (2), 42 U.S.C. § 2000e-2(a)(1),(2). Together, these two provisions make unlawful virtually any action affecting an employee taken “because of” the employee’s race, color, religion, sex or national origin. These provisions penalize employer conduct—not thoughts—but nothing in the text of the statute limits liability to those situations in which an impermissible motive is the sole cause of a decision. On the contrary, Congress rejected an amendment to Section 703 providing that a violation would arise only if an employment decision was made “solely because of” an improper motive. 110 Cong. Rec. H2728, S13838 (1964).

In addition, Section 703(a)(2) makes it unlawful for an employer to “limit” his employees in any way that



would “deprive or *tend to deprive*” them of employment opportunities because of race, sex, etc. (emphasis supplied). This language plainly reaches the “mixed motive” case, since it is the very presence of a lawful motive that makes it uncertain whether unlawful discrimination has worked an absolute deprivation. What can be said in such situations is that there is a “tend[ency] to deprive” an employee of job opportunities, and the statutory text is clear that this is sufficient to establish a violation of the Act.

The 1972 amendments to Title VII highlight the Congressional purpose of purging the workplace of all discrimination. In 1972 Congress extended Title VII to Federal agencies by adding a new Section 717, 42 U.S.C. § 2000e-16, and the aim was to make the substantive law governing the private sector applicable to the Federal government. *Morton v. Mancari*, 417 U.S. 535, 547 (1974). Section 717(a) confirms that Title VII is violated whenever an unlawful motive contributes to an employment decision, since it provides that “all personnel actions affecting [Federal employees] . . . shall be made free from *any* discrimination . . .” 42 U.S.C. § 2000e-16(a) (emphasis supplied).

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Court examined a procedure under which the General Counsel of the Labor Board satisfied his burden of proving an unfair labor practice by showing that an employment decision was caused “at least in part” by anti-union animus. *Id.* at 400 n.5. The employer could then avoid a “violation adjudication” (equivalent to a judicial finding of liability) by proving that the same decision would have been made even absent unlawful motivation. The Court approved this scheme and expressly rejected the contention—identical to petitioner’s here—that the General Counsel had to prove “not only that a forbidden motivation contributed to the discharge but also that the discharge would not have taken place independently of the protected conduct.” *Id.* at 400-401. The Court also observed that the Board could have chosen

to shift the burden at the remedy stage, *id.* at 402, as several courts have done under Title VII. In granting its approval, the Court noted that the Board had relied heavily on *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1974), a First Amendment case in which the Court held that the burden of proof shifted to the employer after the plaintiff showed that an impermissible motive “played a role” in his firing. See *Transportation Management Corp.*, 462 U.S. at 403.

The Court has ruled elsewhere that a plaintiff’s burden of proof is satisfied by showing that an unlawful motive contributed to a decision, even if lawful motives were also present. *E.g.*, *Mt. Healthy; Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). Indeed, *Arlington Heights* characterized *Washington v. Davis* as holding that a plaintiff is “not require[d] . . . to prove that the challenged action rested solely on racially discriminatory purposes.” 429 U.S. at 265. This is so because a legislative or administrative body rarely makes “a decision motivated by a single concern,” so it cannot be said “even that a particular purpose was the ‘dominant’ or ‘primary’ one.” *Id.* This is significant because Price Waterhouse’s collegial partnership admissions process is a private sector analogue to a legislature; if anything, petitioner’s system is even more amorphous, since there are no quantitative standards governing the number of votes needed for approval or rejection of a candidacy by the Policy Board.

The Court has also made clear that the question whether discrimination affected a decision is typically resolved on an up-or-down basis. This is because “[d]iscriminatory intent is simply not amenable to calibration. It is either a factor that has influenced the . . . choice or it is not.” *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 277 (1979).

Proof of invidious intent may take a “variety of forms,” *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578



(1978), including proof of sexual stereotyping. *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978); see also *Fadhl v. City & County of San Francisco*, 741 F.2d at 1165. When a plaintiff uses any of these forms to show that discrimination has contributed to an employment decision, a violation of Title VII is established, whether or not lawful motives are also present.

2. Once a violation of the Act is proved, the defendant has the opportunity under Section 706(g), 42 U.S.C. § 2000e-5(g), to seek to limit specific relief—i.e., hiring, reinstatement, promotion or back pay—by proving that the same decision would have been made in the absence of discrimination. Contrary to petitioner's contention, this is unquestionably the employer's burden because such evidence goes to remedy, not to liability. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). This burden shifting is appropriate because, as the Court has held under the NLRA, "[t]he employer is a wrongdoer . . . It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk . . ." *Transportation Management Corp.*, 462 U.S. at 403.

The defendant's burden of limiting relief must be discharged by clear and convincing evidence. This is a standard which concerns the clarity and objectivity of the employer's proof as much as its weight. Significant public interests are at stake in Title VII cases, especially after a violation of the Act has been established, and a higher standard of proof applies where the issue is the amount of relief due from a proven wrongdoer. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). Use of that approach is warranted here, because the "broad and insistent purposes [of Title VII] dictate that the employer be held to a strict showing, once discrimination has been established." *Day v. Mathews*, 530 F.2d 1083, 1086 (D.C. Cir. 1976). It is instructive that the Equal Employment Opportunity Commission, the

agency charged with enforcing Title VII, applies the clear and convincing standard in the Federal sector, where the Commission has binding regulatory authority. 29 C.F.R. § 1613.271.

3. Ann Hopkins proved a violation of Title VII in this case. As the Solicitor General acknowledges, there is sufficient evidence in the record to support a finding that the rejection of Hopkins' candidacy "was caused, at least in part, by an impermissible motive" (Brief for United States 27). The Solicitor General's reservation is simply that the district court did not make the necessary causal finding; hence he suggests a remand.

The district court's decision makes clear, however, that the court focused on causation. Price Waterhouse maintained a partnership admissions process that gave special weight to negative views. These views, especially from partners who did not know Hopkins well, were decisive ("those who had less than full time involvement with Ann, were in effect the deciders on this one"; see n.2, *supra*). The negative views were "influenced by sex stereotypes" (Pet. App. 58a). (As to this point, the government found especially instructive Thomas Beyer's advice to Hopkins to behave "more femininely," since Beyer was speaking for the Policy Board; Brief for United States 27). And finally, Price Waterhouse knew what was happening: "the maintenance of a system that gave weight to . . . biased criticisms was a conscious act of the partnership as a whole" (Pet. App. 56a).

In short, petitioner knowingly accorded special weight to negative views about Hopkins influenced by sex stereotypes and made no effort to discourage or discount such views. Hence the district court found that Hopkins had proved that "denial of partnership in her specific situation was caused, in part," by petitioner's knowing failure to deal with discriminatory evaluations of her qualifications (Pet. App. 62a; emphasis supplied).

The district court's findings are a proper predicate for its determination that Title VII was violated. At a min-

imum, the partnership admissions system described in the court's findings—a system that “gave weight to . . . biased criticisms” (Pet. App. 56a)—“tend[ed] to deprive” Hopkins of opportunities for advancement because of her sex in violation of the Act. 42 U.S.C. § 2000e-2(a)(2). This is sufficient to establish a violation and to affirm the decisions below.

## ARGUMENT

### I. A VIOLATION OF TITLE VII IS ESTABLISHED IF THE PLAINTIFF PROVES THAT AN EMPLOYMENT DECISION WAS CAUSED, IN PART, BY DISCRIMINATION. THIS BURDEN MAY BE SATISFIED BY SHOWING THAT DISCRIMINATION “TENDEd TO DEPRIVE” THE PLAINTIFF OF EMPLOYMENT OPPORTUNITIES.

Title VII's “central statutory purposes” are clear. The Act is aimed at “eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). Congress implemented these purposes by creating in Section 703 of Title VII a series of unlawful employment practices aimed at employers, employment agencies, labor organizations and joint labor-management training programs. 42 U.S.C. § 2000e-2(a)-(d). The prohibitions on employer conduct are set forth in two provisions in Section 703(a), 42 U.S.C. § 2000e-2(a). Both alone and in concert, these constraints sweep broadly.

Section 703(a)(1) makes it unlawful for an employer to “fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.” Under Section 703(a)(2), it is also unlawful for an employer “to limit, segregate, or classify his employees . . . in any way which would deprive or *tend to deprive* any individual of employment

opportunities or otherwise adversely affect his status as an employee because of” an impermissible reason (emphasis supplied).

Petitioner's principal contention in this case is that there can be no violation of Title VII unless the plaintiff has proved that unlawful discrimination was the “decisive factor” in a decision: “if the employment decision would have been identical even where discriminatory motives and expressions are wholly absent[,] there can be no violation” of the Act (Brief for Petitioner 23).

But on its face neither Section 703(a)(1) nor (2) limits an unlawful employment practice to the situation in which an impermissible motive is the sole or the dominant reason for the employer's action. On the contrary, both simply refer to conduct that occurred “because of” race, sex, etc. And here it is quite significant that both houses of Congress, when debating what eventually became Title VII, expressly rejected an amendment providing that a violation would arise only if an employment decision was made “*solely* because of” an unlawful motive. See 110 Cong. Rec. H2728, S13838 (1964).<sup>9</sup>

In addition, under Section 703(a)(2) an employer may not limit his employees in any way that would “deprive or *tend to deprive*” them of employment opportunities because of a criterion such as race or sex. The empha-

<sup>9</sup> In opposing this provision, Senator Case, the Republican floor manager of Title VII, stated:

The difficulty with this amendment is that it would render title VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of. But beyond that difficulty, this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless.

110 Cong. Rec. S13837 (1964). Moreover, Senator Humphrey, the Democratic floor leader, said that the bill makes “it an illegal practice to use race as a *factor* in denying employment.” *Id.* at S13088 (emphasis supplied).



sized language plainly reaches the mixed motive case, since it is the very presence of a lawful motive that may make it difficult to ascertain whether unlawful discrimination alone worked the deprivation. Often the most that can be said in such situations is that the proven discrimination "tends to deprive" an individual of job opportunities; yet the statutory text is clear that liability attaches if this degree of causation is established. This broad approach to violation is unsurprising, given the Congressional objective of "eradicating discrimination throughout the economy." *Albemarle Paper Co. v. Moody*, 422 U.S. at 421.<sup>10</sup>

Congress reaffirmed this objective in 1972 when Title VII was amended to extend its coverage to agencies of the Federal government. As this Court has observed, the purpose of this extension was to subject the Federal sector to the same substantive provisions of Title VII that already governed private employers: "In general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government." *Morton v. Mancari*, 417 U.S. at 547; see *Chandler v. Roudebush*, 425 U.S. 840, 841 (1976). Hence it is significant that Congress, in applying the private standard to Federal agencies, specified that "all personnel actions affecting [Federal employees] . . . shall be made free from *any* discrimination based on race, color, religion, sex or national origin." 42 U.S.C. § 2000e-16(a) (emphasis supplied). It is clear that an employment decision based *in part* on discrimination would run afoul of this provision.

The vast majority of Title VII cases are susceptible to binary analysis; *i.e.*, the question is whether prohibited

<sup>10</sup> Although we agree with much of the Solicitor General's approach in this case, the government fails to address Section 703 (a)(2) and to give the statutory language its full intended effect. Analogies to the common law may be helpful, but they do not provide a complete answer. This is not a common law case, and the starting point must be analysis of the statutory text. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

discrimination either was—or was not—the cause of a challenged employment decision. The defendant typically offers a legitimate explanation to justify its action, and usually the decision was made by one actor, such as a foreman or other supervisor, perhaps with concurrence by one or two others. Finally, there is often little or no direct evidence of discrimination, such as an epithet or other overt betrayal of bias.

It is the common case that is most amenable to the analytical framework created in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The approach developed in these cases focuses attention on the employer's explanation for a challenged decision and permits use of circumstantial evidence to prove liability. Ultimately "the district court must decide which party's explanation of the employer's motivation it believes." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). If the employer's rationale is discredited, then the plaintiff normally prevails, for the inference drawn is that the discredited motive was a pretext for discrimination.

Contrary to petitioner's insistence, however, this Court has recognized that the *McDonnell Douglas/Burdine* framework is not the exclusive means of proving discrimination. Thus, in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), the Court rejected the assertion that plaintiffs who had produced direct evidence of discrimination had failed to establish liability because they had not made out a *prima facie* case under *McDonnell Douglas*: "This argument fails, for the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." And the Court has also noted that *Burdine* is "inapposite" where a plaintiff has carried the burden of proving that an employment decision was taken, "at least in part," for unlawful reasons, because "[t]he Court [in *Burdine*]



discussed only the situation in which the issue is whether illegal or legal motives, but not both, were the 'true' motives behind the decision." *Transportation Management Corp.*, 462 U.S. at 400 n.5.

The Court has further emphasized that, once a case has been tried, preoccupation with the allocation of burdens specified in *McDonnell Douglas* and *Burdine* is misplaced and may obscure the central issue: "[whether] the defendant intentionally discriminated against the plaintiff." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. at 715 (citation omitted). In short, the *McDonnell Douglas/Burdine* framework is often useful but does not answer every question of proof posed in Title VII litigation. In particular, it does not address the situation where, after all the evidence is in, the trier of fact concludes—as the district court did here—that an employment "decision is a mixture of legitimate and discriminatory considerations" (Pet. App. 59a).

This is not to suggest that there are qualitative differences between the plaintiff's burden of proof in the single-motive cases most characteristic of *Burdine* and those cases in which a court finds mixed motivation. There are not. In all Title VII litigation, *Burdine's* basic underlying principle governs: "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253. Of course, the same principle applies in unfair labor practice cases under the National Labor Relations Act. See *Transportation Management Corp.*, where the Court emphasized that "throughout the proceedings, the General Counsel [of the NLRB] carries the burden of proving the elements of an unfair labor practice." 462 U.S. at 401.

The question is not whether the plaintiff retains the burden of proving a violation but rather what satisfies that burden. Thus in *Transportation Management Corp.* the burden was discharged by a showing that an em-

ployee was fired "at least in part" because of anti-union animus. See 462 U.S. at 400 n.5. Yet once this burden was carried, the Court saw nothing inconsistent in the Labor Board's permitting an employer who wished to escape a violation adjudication—the functional equivalent of a liability determination under Title VII—to prove as an affirmative defense that the employee would have been fired even absent an unlawful motive.<sup>11</sup>

As this Court has observed, Title VII was modeled in key respects on the National Labor Relations Act. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1976). And in *Transportation Management Corp.* the Court sanctioned approaches to liability and relief under that Act that are similar to those employed below and by other Federal courts in Title VII cases. Moreover, the Court expressly rejected the argument—identical in form to that made by petitioner here—that the General Counsel of the Board "had the burden of showing not only that a forbidden motivation contributed to the discharge but also that the discharge would not have taken place independently of the protected conduct of the employee." 462 U.S. at 400-401 (emphasis supplied).

Petitioner's position would, in Senator Cases's words, "render Title VII totally nugatory." 110 Cong. Rec. S13837 (1964) (see n. 9, *supra*). In recognition of this, the District of Columbia Circuit holds that, once a plaintiff proves that discrimination was applied against him with respect to a specific employment decision, "it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor." *Toney v. Block*, 705 F.2d at 1366. In similar

<sup>11</sup> The Court observed further that "[w]e also assume that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer." *Id.* at 402 (emphasis supplied).

fashion, the Ninth Circuit has rejected the contention that an employer is not liable under Title VII unless the plaintiff can prove that she "would have been employed but for sex discrimination," saying that "[t]his contention confuses the separate issues of threshold liability and appropriate relief." *Fadhl v. City & County of San Francisco*, 741 F.2d at 1165. That court held that, "[w]hen an employer's discriminatory treatment consists of a failure to consider an applicant's qualifications, or in the use of evaluative criteria that are discriminatory, the applicant need not prove that he or she was qualified to fill the position in order to obtain some relief." *Id.* at 1165-66 (emphasis supplied).

In *Transportation Management Corp.*, the Court was sanctioning the Labor Board's approach to liability, rather than enunciating a test in the first instance. But the Court observed that the Board had borrowed heavily from what the Court itself had done in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, where

we held that the plaintiff had to show that the employer's disapproval of his First Amendment protected expression *played a role* in the employer's decision to discharge him. If that burden of persuasion were carried, the burden would be on the defendant to show by a preponderance of the evidence that he would have reached the same decision even if hypothetically, he had not been motivated by a desire to punish plaintiff for exercising his First Amendment rights.

462 U.S. at 403 (emphasis supplied).

The Court has used varying formulations to describe the plaintiff's burden in the mixed motive setting, but the message has remained constant. Thus the Court has spoken of the need for a plaintiff to prove that an impermissible criterion was a "substantial factor" or a "motivating factor" in a challenged decision, *Mt. Healthy*, 429 U.S. at 287; *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. at 270-71 n.21, or that it "contributed to" the decision. *Transporta-*

*tion Management Corp.*, 462 U.S. at 400-401. Also in *Transportation Management Corp.*, the Court said that in *Mt. Healthy* "we held that the plaintiff had to show that [an impermissible motive] *played a role* in the employer's decision to discharge him." 462 U.S. at 403 (emphasis supplied).

In none of these cases did the Court hold that a plaintiff must prove that an unlawful factor was the sole or dominant cause of a challenged action, or that the result would have been different in the absence of discrimination. On the contrary, in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976), the Court rejected the notion that "the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies . . ." This was *dicta*, as was the proviso that "no more is required to be shown than that race was a 'but for' cause," *id.*, but the passage rejects an overly rigid approach to causation under Title VII and indicates that liability is fixed in a mixed motive case by proof that one of the motives was unlawful.

The same is true even where legislative or executive action is challenged as unconstitutional because it is based on discrimination:

[*Washington v. Davis* [426 U.S. 229] does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

*Arlington Heights*, 429 U.S. at 265.

*Arlington Heights* is important not only because it shows that a discriminatory purpose need not be "dominant" or "primary" to trigger a violation. Also significant is its recognition that collegial decisions are especially likely to result from a mixture of motivations. And it is doubtful that there exists in the private sector a



more broadly based, collegial decisionmaking process—or one with more amorphous criteria—than that employed by Price Waterhouse to assess candidates for partnership.

The Court's treatment of *Washington v. Davis* in *Arlington Heights* merits special attention. *Davis* was an employment discrimination case brought under the Fifth Amendment, and the Court there declined to hold public employers defending constitutional claims to Title VII's higher standards. 426 U.S. at 247-48. Yet under *Davis* (as the cited passage from *Arlington Heights* makes clear), liability for an EEO violation under the Fifth or Fourteenth Amendments is established even if a discriminatory purpose is not "dominant" or "primary." It turns *Davis* on its head to argue—as petitioner necessarily must—that more is needed to prove a violation under Title VII than under the Constitution.

The Court has recognized that causation, especially in the context of discrimination, is not susceptible to precise mathematical formulation. Often the most that a trier of fact can do is to determine whether or not discrimination affected a result. What the Court said about this in assessing a legislature's motivation is equally applicable here:

Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude. Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.

*Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. at 277 (footnote omitted).

The Solicitor General aspires to a degree of precision that is frequently unattainable. Thus the government posits a situation in which four negative votes may be sufficient to deny admission to partnership and says that discriminatory cause will be established if, *e.g.*, (1) a woman receives five negative votes, of which two are discriminatory, or (2) a woman receives four negative dis-

crimatory votes and five negative legitimate votes (Brief for United States 14). We have no quarrel with this analysis in principle, but it cannot resolve this case or many others. Price Waterhouse did not set a fixed number of negative votes or comments that would disqualify a candidacy, and intensity of opposition—which cannot be measured by up or down votes—was an important element in the process. (One of the striking things about this case—and a key indicator that something was amiss—was the intense opposition voiced toward Ann Hopkins by a few men from other offices who barely knew her; see pp. 9-10, *supra*). Moreover, characterizing individual votes as either discriminatory or legitimate may itself be artificial and, among other things, fails to account for the influence that a particular partner or legislator motivated by bias may have on more fair-minded colleagues. Given these factors, all that can honestly be said by a trier of fact who, having heard the evidence, believes that discrimination affected a collegial decision is something very much like what the district court found here: "stereotyping played an undefined role in blocking plaintiff's admission to the partnership . . . ." (Pet. App. 54a).<sup>12</sup>

Of course, Title VII penalizes actions, not thoughts; hence the Act's prohibitions are directed at conduct, at "employment practice[s]," 42 U.S.C. § 2000e-2(a) (emphasis supplied). But this case is not about "thought control" or "discrimination in the air." While petitioner suggests that any discrimination in this case was insig-

<sup>12</sup> As noted above (p. 11), the district court did not rest on this alone. Since the stereotyping by individual partners may have been unconscious, the court believed that an additional element was needed to establish liability for intentional discrimination; this was the fact that "the maintenance of a system that gave weight to such biased criticisms [of Hopkins] was a conscious act of the partnership as a whole" (Pet. App. 56a). This focus on the action of the employer "as a whole," as opposed to its agents, may have been overly cautious (see *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)) and if anything gave the benefit of the doubt to petitioner.



nificant or *de minimis*, the courts below found otherwise. Indeed, the district court expressly rejected judicial involvement in insignificant matters and said that courts were not responsible for "polic[ing] every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex" (Pet. App. 55a). But that was not the situation here. Instead Price Waterhouse knowingly maintained a partnership admissions system in which negative views—views influenced by sex discrimination—were accorded disproportionate weight in the decision on Hopkins (Pet. App. 58a). The opinions below make it clear that Hopkins suffered not because of discrimination in the air but rather because of discrimination brought to ground and visited upon her.<sup>13</sup>

Proof of discrimination may take a "variety of forms." *Furnco Construction Corp. v. Waters*, 438 U.S. at 578. This includes evidence of sexual stereotyping, as "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. at 707. See also *Fadhl v. City & County of San Francisco*, 741 F.2d at 1165.<sup>14</sup> Where a trier of fact finds—on the

<sup>13</sup> Contrary to petitioner's assertion (Brief for Petitioner 20), the evidentiary support for the finding of discrimination was not limited to the expert testimony on stereotyping. Both the courts below and the Solicitor General were particularly impressed with the advice Thomas Beyer gave Hopkins to behave more femininely (see Brief for United States 27). The testimony of the expert was, however, consistent with this and other evidence of discrimination. As this Court has held, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 699 (1962).

<sup>14</sup> *Fadhl* and the present case vividly illustrate the "double bind" that afflicts victims of stereotyping. In *Fadhl* the plaintiff was criticized for behaving "too much like a woman," 741 F.2d at 1165, while here Hopkins was told to behave "more femininely." Where stereotyping is at work, a woman is "damned if she does and

basis of words, conduct or any of the "variety of forms" which evidence of bias may take—that discrimination affected an employment decision, a violation of Title VII is established.<sup>15</sup>

## II. ONCE A VIOLATION HAS BEEN ESTABLISHED, THE EMPLOYER MAY LIMIT RELIEF BY PROVING THAT THE SAME DECISION WOULD HAVE BEEN MADE ABSENT DISCRIMINATION.

### A. The Employer Has the Burden of Proving that Relief Should Be Limited.

Once a violation has been established, the inquiry turns to appropriate relief. Title VII's remedial provisions are set forth in Section 706(g), 42 U.S.C. § 2000e-5(g). See *Franks v. Bowman Transportation Co.*, 424 U.S. at 762. Under that section, specific relief—i.e., hiring, reinstatement, promotion or back pay—may not be decreed if the challenged decision was made "for any reason other" than prohibited discrimination. This permits the employer to limit the remedy upon a proper showing. But Section

damned if she doesn't." See J.A. 46 (testimony of Dr. Fiske); see also Prather, *Why Can't Women Be More Like Men: A Summary of the Sociopsychological Factors Hindering Women's Advancement in the Professions*, 15 American Behavioral Scientist 172 (1971).

<sup>15</sup> Petitioner raises the specter of plaintiffs alleging mixed motivation in order to take advantage of what is erroneously said to be a more lenient standard of proof. This is specious. First, as we have shown, the plaintiff's burden of proof is the same in all Title VII cases. Second, as the Solicitor General points out, *defendants* are usually responsible for suggesting "multiplicity of motives" (Brief for United States 12). Third, a plaintiff will always have an interest in proving, if possible, that discrimination was the sole cause of a challenged action, since the existence of an independent legitimate cause may result in a limitation on relief (see Section II, *infra*). Fourth, and most significant, a case becomes one of mixed motivation not because a plaintiff or defendant characterizes it that way—but rather because the trier of fact determines that both lawful and unlawful motives contributed to an employment decision. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393.

706(g) does not deal with violation. On the contrary, this provision is not even triggered unless the court first "finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . ." <sup>16</sup>

The relationship between Section 703(a), which defines violation, and the remedy provisions of Section 706(g) is well illustrated by early Title VII cases challenging job segregation. Maintenance of racially segregated jobs (or lines of progression) is unlawful, because it *tends* to deprive blacks of employment opportunities. Hence there is a violation of Section 703(a)(2). But specific relief will not be awarded to a particular black worker if the employer can prove that the employee would not have advanced in any event because of legitimate reasons. See, e.g., *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 (5th Cir. 1974) ("appropriate to require the employer to show that its invidious limitations on free mobility were not the cause of the discriminatee's current position on the economic ladder"). <sup>17</sup>

The Court adopted the distinction between liability and specific relief in *International Brotherhood of Teamsters v. United States*, 431 U.S. at 361: "the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination." At that point, once it is shown that a particular employee sought a job, "the burden

<sup>16</sup> While the Court has sometimes debated the meaning of Section 706(g)—particularly whether it permits a remedy for individuals who were not themselves victims of discrimination—there has been no dispute that this provision is aimed at *relief*. E.g., *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

<sup>17</sup> It was also in the early job segregation cases that the courts first held that relief under Title VII would be denied only if the employer proves by "clear and convincing evidence" that legitimate reasons justified its treatment of an employee. E.g., *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437, 445 (5th Cir.), cert. denied, 419 U.S. 1033 (1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d at 1380. (See Section II.B, *infra*.)

then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 362. See *Franks v. Bowman Transportation Co.*, 424 U.S. at 773 n.32 ("[n]o reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof" on a remedial issue). <sup>18</sup>

The point is that this Court and the lower courts have long recognized that an employer properly adjudged guilty of violating Title VII may still conceivably have a valid, independent reason for the challenged action. But the burden of limiting relief is on the employer.

The Court in *Transportation Management Corp.* explained the rationale for placing the burden of proof on the employer after the plaintiff has proved that an unlawful motive contributed to a decision:

The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

462 U.S. at 403.

The NLRB shifts the burden or proof at the liability stage, thereby giving the employer a chance to avoid a violation adjudication—the equivalent of a liability determination in court—by proving that the same decision would have been made if the unlawful motive had not been present. The Court in *Transportation Management*

<sup>18</sup> The Court recognized the same principle in another Title VII case, *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977) ("[e]ven assuming, *arguendo*, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event"). See also *Arlington Heights*, 429 U.S. at 270 n.21.



*Corp.* sanctioned this approach but also said that the Board could properly have treated such evidence "as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer." 462 U.S. at 402. Whether this shift is said to occur in connection with liability or relief, however, it has exactly the same trigger—a finding by the trier of fact that the plaintiff has carried the burden of proving that an unlawful motive affected the employment decision. *Id.*<sup>19</sup>

Under Title VII, this particular burden of proof properly shifts at the remedy stage after a violation has been established, as is evident from the text of Section 706(g), the controlling statutory provision. This section does not even come into play until the court has found that the employer "intentionally engaged in . . . an unlawful employment practice," and the most such an employer can do under Section 706(g) is to avoid certain specific remedies by proving that the challenged decision was made "for any reason other" than discrimination. 42 U.S.C. § 2000e-5(g). As the Solicitor General observes, other general relief remains available, such as an injunction against future discrimination and attorneys' fees (Brief for United States 23).

Injunctive relief may be crucial. Suppose, for example, that a black worker proves that an employer maintains racially segregated jobs, but the employer is able to show that the employee lacked qualifications for a "white" job. If such proof enabled the employer to escape liability altogether, it would be free to maintain the same segregated system in the future. This would be anomalous under a statute aimed at "eradicating discrimination throughout the economy," *Albermarle Paper Co. v. Moody*,

<sup>19</sup> References to the liability or relief "stages" of a Title VII case do not necessarily mean that there will be separate hearings on violation and remedy. In most individual cases, all evidence will be presented in one trial, but the issues of liability and relief remain analytically distinct.

422 U.S. at 421, and it is not what Section 706(g) envisions. Instead the employer's proof enables it only to avoid promoting the black worker and giving him back pay; the employer remains liable for a violation of Title VII and may be enjoined from maintaining the segregated system. Under Section 706(g), the burden of proof shifts to the employer at the relief stage of a Title VII case, after a violation of the Act has been established.<sup>20</sup>

Finally, it would be confusing doctrinally to have different rules governing burden shifting depending on whether the trier of fact determines that one or more than one motive contributed to an employment decision. In all Title VII cases, the plaintiff has the burden of proving a violation of the Act. In all cases—whether

<sup>20</sup> The court of appeals below appeared to treat this burden as shifting in connection with the liability determination (Pet. App. 25a; see p. 13, *supra*). Some courts have done the same, e.g., *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 713 (6th Cir. 1985), while others have held that the burden of proof shifts in connection with a determination of remedy, e.g., *Fields v. Clark University*, 817 F.2d 931, 936-37 (1st Cir. 1987); *Caviale v. Wisconsin Department of Health & Social Services*, 744 F.2d 1289, 1296 (7th Cir. 1984); *Bibbs v. Block*, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (en banc); *Fadhl v. City & County of San Francisco*, 741 F.2d at 1166-67. In *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875-76 (11th Cir. 1985), the court held that the burden of proof shifted to the employer where direct evidence of discrimination was "accepted by the trier of fact" (*id.* at 875) but did not specify whether the shift occurred in connection with liability or relief.

We believe that the court of appeals below was incorrect in shifting the burden at the liability stage, but this was not harmful to petitioner. As we have shown, whether the shift is said to occur in connection with violation or remedy, it has the same trigger—i.e., proof accepted by the trier of fact that an unlawful motive affected the employment decision. See *Transportation Management Corp.*, 462 U.S. at 402. Given this, shifting the burden at the liability stage benefits the employer by giving it the opportunity to escape all consequences of a Title VII violation. Thus petitioner cannot complain about this aspect of the decision of the court of appeals. (The district court properly shifted the burden in connection with remedy, after it had found a violation of Title VII; Pet. App. 59a.)



involving a single or several motives—this burden is satisfied by proof that discrimination affected the challenged decision. And the employer always retains the opportunity to try to limit relief after the violation has been established.<sup>21</sup>

**B. The Employer's Burden of Limiting Relief Must Be Discharged by Clear and Convincing Evidence.**

Following a determination of a violation of Title VII, the plaintiff is entitled to at least "some relief." *Fadhl v. City & County of San Francisco*, 741 F.2d at 1166. As we have shown, however, the employer may limit specific relief upon a proper showing. 42 U.S.C. § 2000e-5(g). In the District of Columbia Circuit, this showing must be made by clear and convincing evidence. *Day v. Mathews*, 530 F.2d at 1085; *Toney v. Block*, 705 F.2d at 1366.<sup>22</sup>

Preponderance of the evidence is the customary standard in civil litigation, but the clear and convincing approach "is no stranger to the civil law," *Woodby v. INS*, 385 U.S. 276, 285 (1966), and has been employed where the "interests at stake . . . are deemed to be more substantial than mere loss of money," *Addington v. Texas*, 441 U.S. 418, 424 (1979). Thus this Court has required the party with the burden of proof to satisfy the clear

<sup>21</sup> See *Blalock v. Metals Trades, Inc.*, 775 F.2d at 712, in which the court could "discern no meaningful difference" between the plaintiff's burden to prove that an unlawful criterion was a "motivating factor" under *Mt. Healthy* or to prove under *Burdine* that an employment decision was "more likely than not motivated" by such a criterion. In the typical *Burdine* type case, it would be unusual, of course, for the employer to offer a second justification for its actions at the remedy stage.

<sup>22</sup> The Fifth and Ninth Circuits use the same standard, e.g., *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d at 445 (5th Cir.); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981), while other courts speak of preponderant evidence, e.g., *Fields v. Clark University*, 817 F.2d at 937 (1st Cir.); *Bibbs v. Block*, 778 F.2d at 1324 n.5 (8th Cir.); *Miles v. M.N.C. Corp.*, 750 F.2d at 875-76 (11th Cir.).

and convincing test in cases involving termination of parental rights,<sup>23</sup> civil commitment,<sup>24</sup> defamation,<sup>25</sup> deportation<sup>26</sup> and denaturalization.<sup>27</sup>

Petitioner argues that these cases applied the clear and convincing standard to *plaintiffs* and says that the test should not be applied to a *defendant*. This is simplistic at best. The issue is not the party's label but whether it has properly been assigned the burden of persuasion on a particular issue. And assuming the burden is properly assigned, the next question is the type of evidence that will satisfy the burden.

The employer bears the burden of limiting relief under Title VII. And this Court has long recognized that a different standard of proof may apply where the issue is the amount of relief due from a proven wrongdoer. Thus there is a "clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. at 562. This is because "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

It was on the basis of decisions such as *Story Parchment* that the Fifth Circuit held under the National Labor Relations Act that "any doubts about entitlement

<sup>23</sup> *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

<sup>24</sup> *Addington v. Texas*, 441 U.S. at 432-33.

<sup>25</sup> *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971).

<sup>26</sup> *Woodby v. INS*, 385 U.S. at 286.

<sup>27</sup> *Schneiderman v. United States*, 320 U.S. 118, 123-25, 158 (1943). As *Schneiderman* shows, *id.* at 123, the Court's primary concern was not that the quantum of proof be higher but that there be "evidence of a clear and convincing character" (emphasis supplied). See n.28, *infra*, and accompanying text.

to back pay should be resolved against the employer." See *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d at 1380. This approach was then incorporated into Title VII, so that if an employer wishes to show in connection with relief that a black worker

would not be qualified for any other job[,] then its proof must be clear and convincing. Any doubts in proof should be resolved in favor of the discriminatee giving full and adequate consideration to equitable principles.

*Id.* (footnotes omitted).

It is evident that the concern here is as much with the quality as the quantity of the employer's proof. Generalized testimonial assertions will not suffice to limit the remedy; instead evidence is needed that is persuasive in its own right, *e.g.*, proof that an employee did not meet objective, job related standards that had been consistently applied to others. See *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d at 444.<sup>28</sup>

Concurring in *Toney v. Block*, 705 F.2d at 1373, Judge Tamm observed that a "higher standard of proof is justified by the consideration that the employer is a wrongdoer whose unlawful conduct has made it difficult for the plaintiff to show what would have occurred in the absence of that conduct." Consistent with this approach, the district court below held that, "[w]here sex discrimination is present, even if a promotion decision is a mixture of legitimate and discriminatory considerations, uncertainties must be resolved against the employer" (Pet. App. 59a). This, of course, recalls the principle in labor

<sup>28</sup> This approach was foreshadowed in school desegregation cases where courts required school boards seeking to dismiss black teachers to justify their position by clear and convincing evidence, which meant that the black educators had to be considered "objectively in comparison with all teachers." *Wall v. Stanly County Board of Education*, 378 F.2d 275, 278 (4th Cir. 1967) (emphasis in original). See *Rolfe v. Lincoln County Board of Education*, 391 F.2d 77, 80 (6th Cir. 1968).

as well as tort law that it rests upon the wrongdoer "to disentangle the consequences for which it was chargeable from those from which it was immune." *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938), *quoted in Transportation Management Corp.*, 462 U.S. at 399 n.4.

Once a violation of Title VII has been established, the strong presumption is that the plaintiff is entitled to full relief. See *Albemarle Paper Co. v. Moody*, 422 U.S. at 421. The District of Columbia Circuit has relied in part on *Moody* in explaining why an employer wishing to avoid specific relief must produce clear and convincing proof, saying that

[t]he reason for this is straightforward. "Unquestionably, it is now impossible for an individual discriminatee to recreate the past with exactitude." \* \* \* Such a showing is impossible precisely because of the employer's unlawful action; it is only equitable that any resulting uncertainty be resolved against the party whose action gave rise to the problem. Thus, once discrimination is shown, relief should not be narrowly denied. Moreover, the Supreme Court has recently emphasized that the purpose of Title VII is to "eradicat[e] discrimination throughout the economy and [to make] persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, . . . 422 U.S. at 421 . . . . The Court stressed: "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" *Id.* at 417-418. \* \* \* *These broad and insistent purposes dictate that the employer be held to a strict showing, once discrimination has been established.*

*Day v. Mathews*, 530 F.2d at 1086 (emphasis supplied; footnote and some citations omitted).



A Title VII case, particularly one in which a violation has been established, is freighted with the public interest. The twin Congressional purposes of "eradicating discrimination" and "making persons whole" mean that, at this juncture of the litigation, the interests at stake transcend those of private parties and are "more substantial than mere loss of money." *Addington v. Texas*, 441 U.S. at 424. This is just the type of situation in which this Court has applied the clear and convincing standard.

In *Mt. Healthy*, where the burden of proof was shifted to the defendant in a First Amendment setting, the Court stated that the burden would be satisfied by preponderant evidence, although there was no discussion of this point. 429 U.S. at 287.<sup>29</sup> But the Court has also held that employers face more stringent standards under Title VII than in EEO cases arising under the Constitution. *Washington v. Davis*, 426 U.S. at 247-48 (see p. 28, *supra*).

There is reason for this. Title VII was designed to be remedial and was "directed at a historic evil of national proportions." *Albemarle Paper Co. v. Moody*, 422 U.S. at 416. Hence a court must exercise its remedial powers "in light of the large objectives of the Act." *Id.*, quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944). The Civil Rights Act of 1964, of which Title VII is a vital component, remains the single most important piece of social legislation enacted by Congress in the post-war era. The Act has played a major role in permitting this nation to adjust relations between the races (and between men and women) in a largely peaceful fashion. As the court in *Day v. Mathews* recognized, the objectives of this legislation are best realized if an employer seeking

<sup>29</sup> The same appears to have been true of *Transportation Management Corp.*, in which the Labor Board relied on *Mt. Healthy* to fashion its rules of proof. See 462 U.S. at 403. In *Mt. Healthy*, the Court did not discuss the quality of evidence the employer would need to produce to satisfy its burden.

to avoid relief is held to a "strict showing" after liability has been established. 530 F.2d at 1086.<sup>30</sup>

It is significant that the Equal Employment Opportunity Commission, the agency principally responsible for enforcing Title VII, has adopted the clear and convincing approach in the Federal sector, the one arena where the Commission has binding regulatory authority. 29 C.F.R. § 1613.271. The Commission's views on Title VII are entitled to "great deference," *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971),<sup>31</sup> and this is especially true where—as here—those views are expressed in a binding regulation, as opposed to a guideline. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976).

The Commission applies the clear and convincing test at the relief stage. That is, 29 C.F.R. § 1613.271 deals only with "[r]emedial actions" and provides that relief for an employee will include retroactive promotion and back pay, "unless the record contains *clear and convincing evidence* that the employee would not have been promoted or employed at a higher grade, even absent discrimination." *Id.* at § 1613.271(c)(1) (emphasis supplied).

Petitioner argues that the Court should pay no attention to this regulation, asserting that EEOC is free to impose a higher standard on Federal agencies in the administrative setting than they would face in court (Brief

<sup>30</sup> The substantial importance that Congress attached to Title VII, and to civil rights statutes generally, is reflected in part by the fee shifting provision in the statute, Section 706(k), 42 U.S.C. § 2000e-5(k), which is a departure from the customary "American Rule" on fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). This provision was intended to permit a plaintiff to act as a "private attorney general," vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). See *Albemarle Paper Co. v. Moody*, 422 U.S. at 415.

<sup>31</sup> See also *EEOC v. Commercial Office Products Co.*, — U.S. —, 108 S.Ct. 1666 (1988).

for Petitioner 41 n.21). Whatever the merits of this assertion, that is not what has happened. The Civil Service Commission, which formerly had enforcement authority over discrimination complaints against Federal agencies, believed that judicial decisions adopting the clear and convincing test correctly stated the law, and it embraced that standard in its own administrative processes. 43 Fed. Reg. 33732 (1978). EEOC, which obtained Federal sector enforcement responsibility under Reorganization Plan No. 1 of 1978, *reprinted in* 42 U.S.C.A. § 2000e-4 at 311, has adhered to the same standard. Moreover, as noted above, the same substantive principles govern Title VII cases in both the private and Federal sectors. *Morton v. Mancari*, 417 U.S. at 547.<sup>32</sup>

Ultimately, any distinction between the clear and convincing and preponderant standards is immaterial here. The disputed issue in this Court is whether a violation of Title VII was established, not whether proper relief was granted, and—as we have shown—the clear and convincing test comes into play only after the trial court has found a violation, when the burden has shifted to the employer to try to limit relief. In any event, petitioner never contended below that the proof it offered—which

<sup>32</sup> The Solicitor General's failure to comment on EEOC's position in the government's short discussion of the clear and convincing issue is curious (Brief for United States 23 n.10). Moreover, the government misreads the Court's recent decision in *Kung's v. United States*, — U.S. —, 108 S.Ct. 1537 (1988). Contrary to the government's assertion, Part II-A of the opinion (in which all members of the Court joined) expressly reaffirmed that in a denaturalization proceeding INS must prove the "materiality" of false statements by "clear, unequivocal, and convincing" evidence. 108 S.Ct. at 1547. In Part II-B—the portion of the opinion cited by the Solicitor General—the plurality does not retreat from this. Rather the plurality states that INS need not prove, in addition to materiality, that "naturalization would not have been granted if the misrepresentations or concealments had not occurred." *Id.* at 1549. Ironically, then, Part II-B rejects exactly the type of rigid "but for" causation advocated by petitioner here.

failed to meet the clear and convincing test—nevertheless satisfied the preponderance of the evidence standard. Even now, petitioner does not explain why this would be so.

### III. THERE IS NO PERSUASIVE BASIS FOR OVERTURNING THE DISTRICT COURT'S FINDING THAT PETITIONER VIOLATED TITLE VII.

The Solicitor General's legal position is similar in most respects to ours. Thus the government believes that the plaintiff has the burden of establishing a violation of Title VII; that this burden is carried if a plaintiff proves that an unlawful motive was causally related to the challenged decision, even if lawful motives also played a role; and that—once violation is established—the burden shifts to the defendant to try to limit relief under Section 706(g) by providing that the same decision would have been reached in a bias-free setting.

The Solicitor General also acknowledges that "[t]here may be sufficient evidence in the record to support a finding that an illegal motive caused petitioner's employment decision" (Brief for United States 27). Here the government points to Thomas Beyer's advice to Ann Hopkins to behave "more femininely" as evidence that "could support a finding that the decision to deny respondent partnership was caused, at least in part, by an impermissible motive" (*id.*; footnote omitted).<sup>33</sup> The government

<sup>33</sup> Unlike the dissent below, the Solicitor General sees nothing clearly erroneous in the district court's treatment of Beyer's advice. As the government observes, the trial court found that Beyer was speaking for the partnership, and the record supports this determination. For example, a member of the Policy Board testified that he had "no doubt that Tom Beyer would be the one that would have to talk with her [Hopkins]. He knew exactly what the problems were" (Pet. App. 14a). Perhaps even more significant, Joseph Connor, Price Waterhouse's Senior Partner, acknowledged that he discussed Hopkins' candidacy with Beyer at the time the Policy Board was considering her (J. Connor deposition (see n.2, *supra*) at 87-88). There can be no question that the district court's treatment of Beyer's advice is "plausible in light of the record viewed



also notes that comments made by some of the partners (*e.g.*, "charm school," "macho") are "consistent with this assessment of the reasons for the Policy Board's decision" (*id.*).<sup>34</sup> The Solicitor General's reservation is not whether the record in this case would support a finding that Hopkins' rejection "was caused, at least in part, by an impermissible motive"—clearly it would—but instead is whether the district court made such a determination. Hence the government suggests a remand so the court can "clarify its findings" (*id.* at 28).

We believe that the Solicitor General's uncertainty on this point is unwarranted. No special formulations are required, and the district court quite clearly found that Hopkins' rejection was caused, in part, by discrimination (Pet. App. 56a, 58a-59a, 62a). The government agrees that such a finding would have support in the record. It is therefore shielded from attack on appeal. *Anderson v. City of Bessemer*, 470 U.S. at 573.<sup>35</sup>

in its entirety," *Anderson v. City of Bessemer*, 470 U.S. at 574, so its findings here are immune from attack. *Id.*

<sup>34</sup> The Equal Employment Advisory Council suggests that such comments should have been disregarded, citing cases holding that epithets and other derogatory remarks about a person's race or age or sex are irrelevant unless made by the decision maker (Brief for EEAC 16). This misses the point. Such comments are relevant in this case precisely because those partners with negative views were the effective decision makers: "those who had less than full time involvement with Ann, were in effect the deciders on this one" (see n.2, *supra*).

<sup>35</sup> The government may have been misled by the district court's statement that petitioner "had legitimate, nondiscriminatory reasons for distinguishing between [respondent] and the male partners with whom she compares herself" (see Brief for United States 28). But Hopkins had advanced more than one argument on liability, and in the quoted statement the court was addressing one of Hopkins' alternative theories—not the argument on which liability was grounded (see pp. 7-8, *supra*). This Court has recognized that "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing [an award of attorneys'] fee[s]." *Hensley v. Eckerhart*, 461 U.S. 424, 435

The district court focused on the causal connection between discrimination and the partnership denial. The court's opinion is cautious and understated and was premised on its refusal to "accept the view that Congress intended to have courts police every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex" (Pet. App. 55a). Hence it is clear that the court rejected the notion that mere "discrimination in the air"—or, in the Solicitor General's phrase, "stereotyping, without more" (Brief for United States 24)—violates Title VII. But that was not the situation here.<sup>36</sup>

It was because of the negative views of some partners who did not know her well that Ann Hopkins did not become a partner at Price Waterhouse. The district court found this—"[t]he Policy Board gave great weight to the negative views of individuals who had very little contact" with Hopkins (Pet. App. 55a)—and the firm's Senior Partner confirmed it: "those who had less than full time involvement with Ann, were in effect the *deciders* on this one" (emphasis supplied; see n.2, *supra*). The court cautioned, however, that this "emphasis on negative comments did not, *by itself*, result in discriminatory disparate treatment" (Pet. App. 50a; emphasis supplied). Rather, this was only the first of three links that forged the causal chain.

The second link was the fact that partners' views on Hopkins were "influenced by sex stereotypes" (Pet. App. 58a). This finding was amply supported (*see, e.g.*, nn. 33-34, *supra*, and accompanying text), but here again

(1983). This presumes, of course, that a trial court may properly reject one of plaintiff's grounds and still find liability on another, as the court did here.

<sup>36</sup> Our difference with the Solicitor General on this point concerns his seeming inattention to the evidence that a handful of negative comments by partners suffices to defeat a partnership candidacy at Price Waterhouse. In his dissent below, Judge Williams also appeared to ignore this pivotal fact.

the district court was careful to observe that stereotyping—alone—does not violate Title VII. Thus “[t]he comments of the individual partners and the expert evidence . . . do not prove an intentional discriminatory motive or purpose” (Pet. App. 54a).

Instead, the “[c]omments influenced by sex stereotypes” acquired power precisely because “the firm’s evaluation process gave [them] substantial weight” (Pet. App. 58a). Thus these two factors operated in tandem to Hopkins’ detriment. And this was not inadvertent: “the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole” (Pet. App. 56a). This was the third and final link in the chain of causation.

In short, the district court found not merely that partners at Price Waterhouse entertained sexual stereotypes when evaluating Hopkins, but also that the firm acted on those stereotypes. As the Solicitor General points out, evidence of stereotyping is just one of many forms that proof of discrimination may take (Brief for United States 27). But it is a form in which Congress has evinced a special interest. For example, the Senate committee report on the Equal Employment Opportunity Act of 1972, which amended Title VII, reflected the legislative concern with “stereotypical misconceptions by supervisors regarding minority group capabilities.” S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971). The House committee report employed virtually identical language. H.R. Rep. No. 238, 92d Cong., 1st Sess. 17 (1971).<sup>37</sup> Moreover, in construing Title VII, this Court has held that “employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females,” *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. at 707 and that, “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike

<sup>37</sup> The House committee used the term “stereotyped” rather than “stereotypical.”

at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,” *id.* at n.13, quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 729 (1982) (“excluding males from [nursing school] tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job”).

Given the legislative history of Title VII and this Court’s decisions, it is evident that the district court was not plowing new ground in ruling that an employer who acted on stereotypes about women violated the Act. See also *Fadhl v. City & County of San Francisco*, 741 F.2d at 1165; *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1343 n.5 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982).<sup>38</sup>

Price Waterhouse does not have defined standards for accepting or rejecting a candidate for partnership based on negative comments. Thus the trial court candidly declined to try to measure the precise effect of discrimination and found rather that “stereotyping played an undefined role in blocking plaintiff’s admission to the partnership in this instance” (Pet. App. 54a). This was sufficient: “Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the . . . choice or it is not.” *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. at 277. Here the court found that it was a factor.<sup>39</sup>

<sup>38</sup> *Fadhl* shows that proof that discriminatory stereotyping affected conduct need not be grounded on the testimony of an expert, since it does not appear that an expert testified on this issue in *Fadhl*. In the present case, however, the evidence of discrimination—strong in its own right—was buttressed by entirely consistent expert testimony. See n.13, *supra*.

<sup>39</sup> It is evident that by “undefined” the trial court meant unquantifiable, not negligible or insignificant, for the court forcefully rejected judicial intervention in insignificant matters and said that judges should not “police every instance where subjective judgment may be tainted” by sex-based assumptions (Pet. App. 55a).



In the order accompanying its opinion, the district court stated that Hopkins had “prevailed on the merits of her claim that denial of partnership in her specific situation was *caused, in part*, by defendant’s failure to protect against the presence of sex discrimination in evaluations of her qualifications for partnership . . .” (Pet. App. 62a; emphasis supplied). This is a straightforward determination of causation. And contrary to petitioner’s suggestion, the court was not imposing any novel affirmative action requirement on Price Waterhouse. Petitioner knew that “[c]omments influenced by sex stereotypes were made by partners” and that “the firms’ evaluation process gave substantial weight to these comments”—yet the firm did nothing about this (Pet. App. 58a). Instead, it “failed to address the conspicuous problem of stereotyping in partnership evaluations” (*id.*).

This last element was important to the district court’s determination on liability. In the court’s view, petitioner could not be charged with responsibility unless the “partnership as a whole” knew that its admissions system “gave weight to . . . biased criticisms.” This was a cautious approach (see n. 12, *supra*), but the court found the requisite knowledge. And of course, if the partnership knew of the problem and had tried to rectify the situation, then it might not be proper to hold the firm culpable for the views of “rogue” partners. But this was not the situation here. Price Waterhouse knew what was happening and did nothing about it. This was intentional disparate treatment.

There is no mistaking the thrust of the district court’s findings. As the court of appeals held, “Hopkins demonstrated, and the district court found, that she was treated less favorably than male candidates because of her sex” (Pet. App. 19a). That is, she proved “her gender was a significant motivating factor in her failure to make partner” (Pet. App. 22a). Of course, other motives were also present, and both lawful and unlawful motives “were significant factors in the firm’s decision”

on Hopkins (Pet. App. 25a). Thus this was a “case of mixed-motivation” (*id.*).

Petitioner repeatedly implies that it was the court of appeals which first characterized this as a case of mixed motives (*e.g.*, Brief for Petitioner 2, 43). This is plainly wrong. It is the findings of the trier of fact that determine whether multiple motives are at work (see n. 15, *supra*), and here the trial court determined that the decision on Hopkins’ candidacy was “a mixture of legitimate and discriminatory considerations” (Pet. App. 59a).

The district court found that “[d]iscriminatory stereotyping of females was permitted to play a part” in the decision on Hopkins (Pet. App. 58a). This was intentional. And there can be no question that petitioner’s “maintenance of a system that gave weight to . . . biased criticisms” (Pet. App. 56a) violates Title VII, since—at a bare minimum—this was a “limit[ation]” on Hopkins that “tend[ed] to deprive [her] of employment opportunities . . . because of” her sex. 42 U.S.C. § 2000e-2(a)(2).

In *Hishon v. King & Spalding*, 467 U.S. 69 (1984), this Court held that decisions on advancement to partner status are governed by Title VII. Partnership decisions are made collectively and, as this case shows, are often the product of a complex procedure and more than one motive. In this situation, it would be extraordinarily difficult for any employee to carry what petitioner contends is this plaintiff’s burden—to prove that she would have become a partner except for discrimination. Acceptance of this contention would rob *Hishon* of any meaning and, as we have shown, would be contrary to Title VII’s language, history and purposes.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE**

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### **QUESTION PRESENTED**

Whether, in this Title VII disparate treatment action, the court of appeals properly held that evidence of sexual stereotyping placed the burden of persuasion on the defendant to show by clear and convincing evidence that the decision against promoting respondent to partner was caused by reasons other than intentional sex discrimination.



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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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No. 87-1167

PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE**

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**INTEREST OF THE UNITED STATES**

This case presents important issues concerning the meaning and application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The United States has responsibility for enforcing that statute. Moreover, the United States, as the nation's largest employer, is governed by Title VII's requirements.

**STATEMENT**

1. Petitioner is an accounting firm that, at the time this action was commenced, had 662 partners in 90 offices. New partners are selected from the ranks of senior managers through a formal recommendation-and-review process. Partners in a local office propose a candidate for admission. Each of the firm's partners is then invited to complete evaluation forms that request information regarding the candidate's business development, technical expertise, and interpersonal skills. The partners are also



asked to make a "bottom line" recommendation—*i.e.*, whether to admit, deny, or defer consideration. Pet. App. 41a-42.

Petitioner's Admissions Committee reviews each candidate's file and interviews partners to supplement the written evaluations. The Admissions Committee prepares a summary of the evaluations. The Committee then makes recommendations to the firm's Policy Board, which decides whether to put a candidate to a vote before the partnership, to deny admission, or to place a candidate on "hold" for a specified period. Pet. App. 41a-42a.

In 1982, respondent Hopkins was proposed for partnership. She was the only woman among the 88 candidates that year. Respondent had been successful as a senior manager at petitioner. She played a pivotal role in securing important government contracts, and had the best record of the 88 candidates in terms of obtaining major contracts. Respondent had no difficulty dealing with clients, and her clients were very pleased with her work. Respondent was viewed as a highly competent project leader who worked long hours. Pet. App. 43a.

A number of petitioner's partners, however, told the Admissions Committee that respondent had trouble with "interpersonal skills"—in particular, that she was overly aggressive, unduly harsh, difficult to work with, profane, and impatient with the staff. Eight of the 32 partners who submitted written evaluations recommended that she be denied admission; three favored placing her candidacy on hold, and eight stated that they had an insufficient basis for an opinion. Based on the number of "no" votes and the negative comments, the Admissions Committee recommended that "she should be HELD at least a year" (Pet. App. 44a). The Policy Board agreed. A few months later, two partners in respondent's home office decided that they could no longer support her candidacy. Without such support, respondent had no chance of becoming a partner. She resigned, started her own firm, and commenced this action against petitioner for sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 43a-44a.

2. At trial, respondent presented evidence to support three theories of liability. The district court rejected respondent's initial theory that criticisms of her interpersonal skills were pretextual (Pet. App. 46a). The court found it "clear" that "the complaints about the plaintiff's interpersonal skills were not fabricated as a pretext for discrimination" (*ibid.*). According to the district court, respondent's "conduct provided ample justification for the complaints that formed the basis of the Policy Board's decision" (*id.* at 46a-47a).

Respondent further argued that, even if her interpersonal skills were deficient, petitioner discriminated by admitting men with similar problems into the partnership. The district court, however, found that the evidence did not support this theory (Pet. App. 48a-51a). The court found that petitioner "had legitimate, nondiscriminatory reasons for distinguishing between [respondent] and the male partners with whom she compares herself" (*id.* at 48a).

The third theory advanced by respondent was that petitioner's decision-making process was tainted by sexual stereotyping. Respondent alleged that male partners who criticized her interpersonal skills based their evaluations on their view that assertive behavior is tolerable in men but not in women (Pet. App. 51a-52a). Specifically, respondent cited a number of comments made by male partners, such as the remark that she needed to take a "course at charm school" (*id.* at 51a), and the advice of a partner, who the district court found spoke on behalf of the Policy Board (*id.* at 52a), that respondent ought to walk, talk, and dress "more femininely" (*ibid.*). She also cited comments from the files of other women partnership candidates, such as the remark that one candidate acted like "Ma Barker" (*ibid.*).

The district court found that "stereotyping played an undefined role in blocking [respondent's] admission to the partnership" (Pet. App. 54a). The court also found, however, that the stereotypes reflected in partner comments were "unconscious" as distinguished from intentional (*ibid.*). The court accordingly concluded that "[t]he comments of the individual partners and the expert evidence \* \* \* do not prove an intentional discrim-

inatory motive or purpose" (*ibid.*). In the district court's view, Title VII does not authorize the courts to "police every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex" (*id.* at 55a).

This did not end the district court's inquiry, however. The court went on to find that, "[a]lthough the stereotyping by individual partners may have been unconscious on their part, the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole" (Pet. App. 56a). The court accordingly held that because of its "failure to take the steps necessary to alert partners to the possibility that their judgments may be biased, to discourage stereotyping, and to investigate and discard, where appropriate, comments that suggest a double standard" (*id.* at 57a-58a), petitioner had violated Title VII.

The district court then turned to the issue of remedy. The court acknowledged that it could not say that petitioner "would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations" (Pet. App. 59a). Relying on *Williams v. Boorstin*, 663 F.2d 109, 117 (D.C. Cir. 1980), and *Day v. Mathews*, 530 F.2d 1083, 1085-1086 (D.C. Cir. 1976), however, the court stated (Pet. App. 59a) that "once a plaintiff proves that sex discrimination played a role in an employment decision, the plaintiff is entitled to relief unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination." The court found that petitioner had not met this burden, and thus that respondent was entitled to relief.<sup>1</sup>

3. The court of appeals affirmed the ruling that petitioner violated Title VII (Pet. App. 1a-39a). The majority held that there was sufficient evidence to support the finding that a sexual stereotype—*i.e.*, that females should not be assertive—infected the partnership decision-making process. The court of appeals believed that this finding meant that respondent "was treated

<sup>1</sup> The district court held, however, that respondent failed to prove that she had been constructively discharged. Accordingly, the court limited respondent's relief to a declaratory judgment and attorney's fees. Pet. App. 60a-61a.

less favorably than male candidates because of her sex" (*id.* at 19a). The court held that this fact "is sufficient to establish discriminatory motive; the fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it" (*ibid.*).

The court of appeals then rejected petitioner's argument that respondent failed to prove "the exact impact that stereotyped comments had on the Board's ultimate decision" (Pet. App. 19a). The court held that the district court "had ample support for its conclusion that stereotyping played a significant role in blocking [respondent's] admission to the partnership" (*id.* at 20a). Once respondent proved that fact, the court of appeals reasoned, petitioner bore the burden "to show that the decision would have been the same absent discrimination" (*id.* at 22a-23a). The court of appeals concluded that respondent did not carry that burden by clear and convincing evidence (*id.* at 25a).<sup>2</sup>

Judge Williams dissented. He believed that there was insufficient evidence to support a finding of intentional discrimination (Pet. App. 38a). He noted that the district court found that petitioner's stated reason for not promoting respondent—that she had poor interpersonal skills—was not a pretext; thus at most respondent had proved "generalized discrimination" or the "existence of sexist attitudes" in the workplace (*ibid.*). Accordingly, Judge Williams concluded that respondent had not proven that she had been treated differently because she is a woman.

## SUMMARY OF ARGUMENT

1. Decisions in the lower courts are in a state of considerable disarray both as to the meaning of the requirement that the plaintiff must have suffered loss of employment opportunities "because of" illegal discrimination—the causal requirement of

<sup>2</sup> The court of appeals reversed the aspect of the judgment not awarding equitable relief for constructive discharge (Pet. App. 27a).



Title VII—and as to the procedures for establishing liability and entitlement to relief. The petition (Pet. I, 12) frames these issues in terms of the proper treatment of Title VII cases involving “mixed motives,” that is, cases in which the evidence shows that both discriminatory motives and nondiscriminatory motives played some role in reaching a particular employment decision. Although a number of lower courts have looked at the issue in this way, we think that the correct legal analysis should not vary depending on whether the case is categorized as one involving “mixed motives” or “single motives.” Virtually every Title VII disparate treatment case will to some degree entail multiple motives. Thus, if the elements of Title VII liability or the burden of persuasion differs depending on the “proper” categorization of a case as involving either mixed or single motives, litigation will focus on what label should be affixed to cases, rather than on the ultimate question in every Title VII case: whether the defendant has discriminated against the plaintiff on the basis of a prohibited criterion.

Title VII, in the tradition of the common law of torts, plainly requires a causal connection between an adverse employment decision and the plaintiff’s race, color, religion, sex, or national origin. This conclusion is compelled by the language of Section 703 of Title VII, 42 U.S.C. 2000e-2, its legislative history, and this Court’s decisions. But neither the statute nor this Court’s decisions specify how causation is to be defined. In these circumstances, we think that the proper meaning of causation under Title VII should be determined by looking to the common law. We do not agree, however, with those courts that have characterized the common law as imposing a rigid “but for” definition of causation, requiring that the illegal motive be a necessary condition of the challenged decision. The most accurate description of the common law test is that an illegal motive is a “cause” of a given outcome if the motive was sufficient by itself to produce the outcome, or if it was a necessary element in any set of motives that together was sufficient to produce the outcome. This test comports with common sense notions of causation by recognizing that, in the case of two in-

dependent and sufficient motives, each motive should be regarded as a “cause” rather than neither. All Title VII cases—whether they involve one, two, or many motives—may be resolved under this common law view of causation.

A Title VII plaintiff bears the burden of proving causation. The Court has often held that the plaintiff bears the burden of “persuading the court that she has been the victim of intentional discrimination.” *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). And the plaintiff is such a “victim” only if the employer’s illegal motive caused an adverse employment decision. A contrary rule that would shift the burden of proof on causation to the defendant is not required by the policies of Title VII, and would present severe problems in defining the threshold showing that the plaintiff would have to make before such a shift would occur.

2. Although the plaintiff bears the burden of persuasion in proving liability under Section 703 of Title VII, Section 706(g), which sets forth the remedies for Title VII violations, allows a defendant to limit the plaintiff’s remedy by showing by a preponderance of the evidence that it would have reached the same employment decision even in the absence of an illegal cause. Section 706(g) thus expresses the same concern as this Court announced in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977): that a plaintiff should not be placed in a better position than she would have occupied in the absence of the illegal discrimination.

3. The evidence in this case may support a finding that an illegal motive caused petitioner’s decision not to promote respondent. The lower courts, however, did not make this finding. They based petitioner’s liability on evidence of stereotyping—that is, comments by some of petitioner’s partners suggesting that women should not be aggressive or assertive. But the expression of stereotypes, by itself, is not a Title VII violation. Rather, comments reflecting stereotypes should be regarded as evidence of illegal conduct. To make out a case of illegal sex discrimination, respondent must prove that use of a sex stereotype was part of a motive that in fact disadvantaged her. Thus, the case should be remanded for the district court to



determine whether respondent was rejected as a partner at least in part because of negative votes that were motivated by the view that she is too aggressive for a woman.

## ARGUMENT

### I. TITLE VII REQUIRES A PLAINTIFF CLAIMING DISPARATE TREATMENT TO SHOW THAT AN ILLEGAL MOTIVE CAUSED AN ADVERSE EMPLOYMENT DECISION

This case requires consideration of a number of basic questions about the role of causation under Title VII: Does Title VII require a causal link between a discriminatory motive and an employment decision? If so, how is the concept of "cause" to be defined in the Title VII context? Does Title VII impose a different analysis of causation in mixed motive cases than in single motive cases? Who bears the burden of proving causation? And may a defendant limit the plaintiff's remedy if the defendant proves that, in addition to an illegal cause, an independent and wholly valid motive also explains the employment decision? The Court should resolve those questions in light of the language and policies of Title VII, supplemented, where appropriate, with reference to the understanding of the concept of causation that has developed in the common law.

#### A. Causation Is a Required Element of Liability Under Title VII

There is no doubt that causation is a necessary element of Title VII liability. Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) (emphasis added), provides that it shall be an unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin \* \* \*."<sup>3</sup> The words

<sup>3</sup> Similarly, Section 703(a)(2), 42 U.S.C. 2000e-2(a)(2) (emphasis added) provides that it shall be an unlawful employment practice to limit, segregate, or classify employees "in any way which would deprive or tend to deprive any

"because of" plainly connote a causal connection between the employment decision and the "individual's race, color, religion, sex, or national origin."<sup>4</sup>

This Court's Title VII decisions reflect this understanding. The Court has described the evidentiary showing required to establish liability in the disparate treatment context in a variety of ways. Virtually all of these formulations, however, employ one or more synonyms for causation. See, e.g., *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 875 (1984) (emphasis added) (question is whether "the particular employment decision at issue was made *on the basis of* race"); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977) (emphasis added; footnote omitted) (question is whether "an employment decision was *based on* a discriminatory criterion illegal under the Act"); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (emphasis added) ("no more is required to be shown than that race was a '*but for*' cause").

Title VII's legislative history leads to the same conclusion. One of the most pointed objections to the legislation that eventually became Title VII was that it would impose liability on an employer for entertaining bad thoughts. As Senator Ervin put it in an extended colloquy with Senator Case, the Republican floor manager of Title VII, it was feared that Title VII was a "thought control bill" (110 Cong. Rec. 7254 (1964)). Senator Case rejected this claim in the strongest terms, noting (*ibid.* (emphasis added)) that the defendant "must do or fail to do something in regard to employment. There must be a specific external act, more than a mental act. Only if he does the act *because of* the grounds stated in the bill would there be any legal consequences." As this makes clear, Title VII does not impose liability for discriminatory animus without more. It imposes

individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin."

<sup>4</sup> See, e.g., *Merrill v. Los Angeles Gas & Elec. Co.*, 158 Cal. 499, 508, 111 P. 534, 538 (1910) ("To trace an injurious distinction from the use of the phrase 'because of,' instead of the phrase 'caused by' is merely logomachy.").

liability only when a discriminatory motive *causes* an adverse decision with respect to the compensation, terms, conditions, or privileges of employment.

It would, of course, have been highly unusual had Title VII not required some causal link between an illegal motive and the challenged employment decision. Throughout the law of torts, contracts, and those aspects of criminal law where liability is defined in terms of bringing about a proscribed result, it is not enough to show that the defendant violated a legal rule and that the plaintiff suffered a harm; it is also necessary to prove that the breach of duty *caused* the harm. See generally O. Holmes, *The Common Law* 160 (1881); Pound, *Causation*, 67 Yale L. J. 1, 10-14 (1957); cf. *Valley Forge Christian College v. Americans United For Separation of Church & State*, 454 U.S. 464, 472 (1982). For example, a defendant may act negligently in breach of a general duty of care, but he is not liable in tort unless his negligence causes harm to the plaintiff. See *Restatement (Second) of Torts* § 430 (1965). The causal language of Section 703(a) shows that Congress legislated the same understanding when it enacted Title VII.

**B. Causation Is Established if an Illegal Motive Was Sufficient by Itself for an Adverse Employment Decision, or if an Illegal Motive Was Necessary in Combination with Another Motive or Motives for the Decision**

Although causation is plainly an element of Title VII liability, neither the statute nor this Court's decisions specify how causation is to be defined. The only significant legislative history that sheds light on this question occurred when Senator McClellan introduced an amendment that would have modified Section 703(a) to provide that a Title VII violation could be found only if an employment decision was taken "*solely* because of" an impermissible motive. In effect, the McClellan amendment would have eliminated any possibility of Title VII liability in mixed motive cases—where an employment decision is in part the product of discriminatory motives, and in part the product of non-discriminatory motives. The Senate rejected the amendment, as did the House (see 110 Cong. Rec. 2728, 13838 (1964)). In opposing the proposal, Senator Case remarked (*id.* at 13837):

The difficulty with this amendment is that it would render title VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of. But beyond that difficulty, this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless.

The rejection of Senator McClellan's proposed amendment is persuasive evidence that Congress contemplated that Title VII liability could be established where the employment decision is the product of multiple or "mixed" motives. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. at 282 n.10 (Title VII plaintiff need not show "that he would have in any event been rejected or discharged solely on the basis of his race, without regard to [other] alleged deficiencies"). But beyond that, the legislative history, like the statute itself, provides little explicit guidance in defining what role a discriminatory motive must play in producing an employment decision before it can be called a "cause."

The problem is, however, a familiar one in the law. As every common lawyer knows, any event—and certainly an event as complex as an employment decision—may be described as the consequence of literally an infinite number of antecedents. "This is the 'cone' of causation, so called because, since any event has a number of simultaneous conditions, the series fans out as we go back in time." H. Hart & T. Honore, *Causation in the Law* 69 (2d ed. 1985) (citation omitted). The task for the courts is to pick out of the infinite manifold of antecedents those which it is sensible, relative to the purpose at hand, to emphasize as the cause or causes of an event.<sup>5</sup> As Congress im-

<sup>5</sup> For instance, when describing the cause of a fire the presence of oxygen in the environment may or may not be appropriately picked out for mention—if the context is a scientific experiment or a space vehicle accident the mention may be quite appropriate, while in a case of domestic arson it obviously would not. See H. Hart & T. Honore, *Causation in the Law* 35 (2d ed. 1985).



plicitly recognized in rejecting the McClellan amendment, this process cannot be accurately stated in terms of whether a particular factor is the *sole* cause of a particular event. Rather, what is needed is an analytical framework for picking out for special attention those antecedents which may be denominated as causes as opposed to "mere" background conditions.

The lower courts are divided on how to define the requisite standard of causation in cases in which one of the parties—generally the defendant—has made an issue of the multiplicity of motives. Some courts believe that Title VII requires proof that the discriminatory motive was a necessary condition or "but for" cause of the employment decision. See, e.g., *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985). In this view, there can be no liability under Title VII if the same decision would have been reached in the absence of an illegal motive. Other courts hold that Title VII requires proof that the discriminatory motive was a "motivating factor" or a "significant factor." See, e.g., *Fields v. Clark University*, 817 F.2d 931 (1st Cir. 1987). The courts that have adopted the "necessary condition" or "but for" standard have done so, at least in part, on the understanding that this is the minimal definition of causation traditionally required by the common law. In contrast, the courts that have rejected that test in favor of the "motivating factor" standard have cited decisions of this Court adjudicating constitutional claims (see *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-286 (1977)), and the concern that the "but for" test is too stringent a burden.

We agree with those courts that look to traditional judicial understandings of causation—i.e., the common law—as the benchmark for defining causation under Title VII. Contrary to the usual formulation by these courts, however, we do *not* understand the common law to require the plaintiff to make a showing of "but for" causation in every case. A more accurate

description of the common law test for causation, we think, is that an illegal motive is a "cause" of a given outcome if the motive was sufficient by itself to produce the outcome, or if it was a necessary element in any set of factors that together was sufficient to produce the outcome. See H. Hart & T. Honore, *supra*, at 107-129; Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1789-1790 (1985). This is not the same as "but for" causation, because an illegal motive can be a cause of an outcome even if a legitimate motive or a set of legitimate motives was also sufficient to produce that outcome.

This is essentially the test for causation under the *Restatement (Second) of Torts* (1965). Section 431 of the *Restatement* provides that negligent conduct is a "cause of harm to another if" it is "a substantial factor in bringing about the harm." Section 432 of the *Restatement* then states:

(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.

(2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.

In other words, Section 432(1) initially provides that the actor's negligence is a cause ("substantial factor" in the *Restatement's* terms) only if it is a necessary condition ("but for" cause) of the harm; but Section 432(2) then adds the proviso that the actor's negligence is also a cause if it was *sufficient* to bring about the harm, even if other forces were present that were also sufficient to generate the harm. In the end, therefore, the *Restatement* rejects a rigid "but for" notion of causation in favor of a sufficiency view.<sup>6</sup>

<sup>6</sup> The common law test of causation differs from the "but for" view of cause in cases of overdetermined outcomes. A motive can be a "cause" under the common law test even if another motive or set of motives was sufficient for



We believe that the common law test outlined above should apply to Title VII cases in the following way. Suppose a partnership has a rule that it will deny admission to anyone who receives four or more negative votes. If a candidate receives two negative votes because she is a woman, and three because of her abrasive personality, then the two discriminatory votes would be a cause of the decision (the discriminatory votes are a necessary element of a set of four or more votes sufficient to produce the outcome). Alternatively, if the plaintiff receives four negative discriminatory votes, and five negative votes based on her personality, then the discriminatory votes would *also* be a cause (the discriminatory votes being sufficient in themselves to produce the outcome), even though it cannot be said that the discriminatory votes are a "but for" cause. Only if

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the outcome. A motive is a cause if it was sufficient, by itself or in combination with other factors, to produce the result. The common law thereby avoids the troublesome implication of "but for" causation that, in cases with multiple sufficient causes, there would be *no* cause. As Hart and Honore state, in the case of dual sufficient conditions, "a legal system should treat each as the cause rather than neither." H. Hart & T. Honore, *supra*, at 124. Accord W. Prosser, *Law of Torts* 239 (4th ed. 1971).

The somewhat confusing formulation of the *Restatement*, which appears first to embrace and then to reject the "but for" test, reflects more a dispute among academics than a substantial uncertainty in the case law or even in the intuitions of common sense. Common sense notions of causation reflect simple models in which a force is applied to produce a result—e.g., a brick is hurled through a window, or a person is pushed in front of a train. See Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 166-169 (1973). And such models implicitly depend on a sufficiency view of causation. Some legal scholars, believing both common sense and the common law to be insufficiently scientific and rigorous, proposed distinguishing between "cause in fact"—a supposedly scientific and rigorous test—and "proximate cause" or "legal cause"—an additional hurdle to be cleared by plaintiffs which was conceded to be "evaluative" and to allow for policy judgments. See R. Keeton, *Legal Cause in the Law of Torts* vii-ix (1963); L. Green, *Rationale of Proximate Cause* 200 (1927). As Hart & Honore demonstrate, however, the case law does not accord with this neatly dichotomous view. Moreover, any analytic rigor dissolves in the face of troublesome counterexamples, such as those of multiple sufficient causes. At the end of the day, the common law, common sense, and the *Restatement* all support a sufficiency view.

the discriminatory votes were not sufficient either by themselves or in combination with other votes could it be said that the discriminatory votes were not a cause of the decision. For example, if a candidate received three negative votes because she was a woman, but no other negative votes, and the partnership then decided unanimously for economic reasons not to make any new partners, the three negative votes would not be sufficient in themselves to produce the result, nor would they be a necessary element in any set of conditions sufficient to produce the result (the decision to defer making partners on economic grounds being sufficient in itself without the added element of the discriminatory votes).<sup>7</sup>

Because this concept of causation relies on the ideas of "necessity" and "sufficiency," it comports with what we mean when we say that something "caused" a result—*i.e.*, that it contributed to, or made a difference to, the outcome. Indeed, this may be implicit in the lower court decisions that adopt a "significant factor" test. To say that intentional discrimination was a "significant factor" or a "motivating factor" necessarily implies that it was a *factor*—that it affected the outcome. On the other hand, to denominate a motive a "cause" if it did not produce the outcome, either by itself or in combination with other elements, is to abandon the statutory requirement of causation.

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<sup>7</sup> The common law view that we propose is not foreclosed by *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). The Court in *McDonald* held that an employer must apply its disciplinary rules "alike to members of all races" (*id.* at 282, quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)). In dictum, the Court noted that a plaintiff need not prove that he would have "been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies; \* \* \* no more is required to be shown than that race was a 'but for' cause" (427 U.S. at 282 n.10). This statement was not necessary to the Court's holding, and it simply indicates that Title VII liability attaches if the plaintiff proves "but for" causation; the statement does not foreclose liability by proof of a different type of causation—one based on the notion of sufficiency.

**C. In Determining Liability Under Title VII, "Mixed Motive" Cases Should Be Treated the Same as "Single Motive" Cases**

In assessing the role of causation under Title VII, a number of lower courts have suggested that either the definition of causation or the burden of persuasion in establishing causation should vary depending on whether the case is categorized as one involving "mixed motives" or "single motives." See, e.g., *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 709-712 (6th Cir. 1985). We think this is a mistake. As noted above, Congress recognized that virtually every disparate treatment case will to some degree entail multiple causes. Thus, if the elements of Title VII liability or the burden of persuasion differs depending on the "proper" categorization of a case as involving either mixed or single motives, the predictable result will be pointless litigation over what label should be affixed to cases, rather than on the *ultimate* question in every Title VII case: "whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. at 335 n.15).

Nor do we think this Court's decisions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981), support the notion that disparate treatment cases should be divided between those involving single motives and those involving mixed motives. *McDonnell Douglas* and *Burdine* adopted the now familiar three-step procedural process for resolving disparate treatment cases. Under this process, the plaintiff must initially establish a prima facie case of employment discrimination;<sup>8</sup> if the plaintiff is successful, the defendant must then come for-

<sup>8</sup> The plaintiff must show that she (1) is a member of a protected class; (2) that she sought and was qualified for an employment opportunity which was available; (3) that despite her qualifications she was rejected; and (4) that after her rejection the employer continued to seek qualified applicants for the position (see *McDonnell Douglas*, 411 U.S. at 802).

ward with evidence tending to show that the adverse action was taken for legitimate, nondiscriminatory reasons; if the defendant's evidence raises a genuine issue of fact, then the plaintiff must introduce evidence tending to show either that the defendant's explanation "is unworthy of credence," or that "a discriminatory reason more likely motivated the employer" (*Burdine*, 450 U.S. at 256). Although a number of courts have suggested that this framework applies only to single motive cases, and that mixed motive cases must be analyzed under a different framework, we think that the *McDonnell Douglas-Burdine* framework is well suited to *all* disparate treatment cases.

This Court's decisions make clear that the *McDonnell Douglas-Burdine* framework is not a process for uncovering which of two possible explanations is the "sole" cause of an employment decision. Rather, the framework employs what are in effect a series of "presumption[s]" about causation in order to simplify the production of evidence and proof in disparate treatment cases and to frame the contested factual issues with "sufficient clarity" (*Burdine*, 450 U.S. at 255). Thus, if the plaintiff establishes a prima facie case and the defendant fails to introduce evidence of a legitimate, nondiscriminatory explanation for the employment decision, this "in effect creates a presumption that the employer unlawfully discriminated against the employee" (*id.* at 254). See also *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Similarly, if the defendant comes forward with a legitimate, nondiscriminatory explanation, but the plaintiff demonstrates to the satisfaction of the trier of fact that the explanation is a pretext, then again the trier of fact is entitled to presume from the plaintiff's prima facie case that the decision was caused by discrimination. *Burdine*, 450 U.S. at 256. On the other hand, if the defendant comes forward with a legitimate, nondiscriminatory explanation, and the plaintiff fails to show that it is a pretext, then the trier of fact is entitled to presume that the employment decision was *not* caused by discrimination.



Clearly, the fact that the *McDonnell Douglas-Burdine* framework relies on certain *presumptions* about causation in no way suggests that employment decisions are always or even usually the product of one cause. Indeed, *Burdine* expressly contemplates that the plaintiff may attempt to answer the defendant's explanation by introducing evidence tending to show an alternative, discriminatory explanation for the decision. If the plaintiff follows this course, then the court is presented at trial with what is in effect a case of mixed motives: the defendant has offered one explanation, and the plaintiff another. It would be artificial to insist in such a case that the "true" explanation must always be either one or the other, and never (as Senator Case indicated (see page 11, *supra*)) some combination of both. And it would be even more problematic to insist that, if the explanation is some of both, the case must be decided under some altogether different doctrinal rubric. To determine liability by first applying the *McDonnell Douglas-Burdine* framework and then, if it appears at the trial that there were mixed motives, to superimpose some burden-shifting procedure on top of this framework, would be to compound procedural refinements in a confusing and ultimately unproductive fashion. As we explain below (pages 21-24, *infra*), we think that the burden-shifting adopted by *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyles*, 429 U.S. 274 (1977), is appropriately brought to bear in Title VII suits at the remedial stage, where distinct issues are involved and there is a separate statutory basis imposing the burden on the defendant. To apply this doctrine at the liability stage, however, would simply make the "inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof' in deciding this ultimate question." *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (citation omitted).

In sum, we believe that *all* Title VII disparate treatment cases should be resolved under the *McDonnell Douglas-Burdine* framework, whether they involve one, two, or multiple possible causes. In many of these cases, the issue of causation will be

resolved by presumption, and thus need not be confronted directly. But when all the presumptions are exhausted, the court must then "decide the ultimate factual issue in the case" (*Aikens*, 460 U.S. at 715). As set forth in Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1), that issue is whether the plaintiff suffered discrimination "because of" his or her race, color, religion, sex, or national origin.

#### D. The Plaintiff Bears the Burden of Persuasion on Causation

Since causation is a necessary element of Title VII liability, then under this Court's decision in *Burdine* it follows that the plaintiff has the burden of persuasion on this element. The Court noted in *Burdine* that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff" (450 U.S. at 253). In other words, the plaintiff bears the burden of "persuading the court that she has been the *victim* of intentional discrimination" (*id.* at 256 (emphasis added)). And, as we have shown, the plaintiff is such a "victim" only if the employer's illegal motive caused the adverse employment decision.

That the plaintiff bears the burden of persuasion on the element of causation is reinforced by the legislative history of Title VII. In the Senate debates, Senator Dirksen offered the following objection to the proposed House bill (110 Cong. Rec. 7218 (1964)): "If the employer discharges a Negro, he must prove that the dismissal has nothing to do with race. When an employer promotes or increases the pay of a white employee, he must show that he was not biased against the Negro worker who was not promoted." Senator Clark, the Democratic floor manager of Title VII, corrected Senator Dirksen's misunderstanding (*ibid.* (emphasis added)): "*The Commission* must prove by a preponderance [of the evidence] that the discharge or other personnel action was because of race." This allocation of the burden of persuasion on the charging party was reiterated by Senator Case as part of his extended exchange with Senator Ervin over whether Title VII would impose liability for discriminatory thoughts (*id.* at 7255 (emphasis added)): "The



only way a state of mind can be proved is by an external act, or by a pattern of acts, of a man, or by a treatment that was given. *The burden of proof is on the plaintiff.*"

There is no special need in the Title VII context to deviate from the general tort rule that the plaintiff bears the burden of showing causation (see *Restatement (Second) of Torts* § 433B (1965)). The common law view of causation that we outlined above, in contrast to a strict "but for" view, does not impose an undue burden on Title VII plaintiffs. The plaintiff need prove causation, like any other element of liability, only by a preponderance of the evidence. In a case of multiple motives, therefore, the plaintiff must show only that it was more likely than not that the discriminatory motive was sufficient to produce the result. The plaintiff need not exclude the possibility that legitimate reasons were also sufficient to produce the outcome. Moreover, although the defendant will usually have better access to facts about why the plaintiff was denied an employment opportunity, this unevenness is largely eliminated because the defendant already has the burden of producing any evidence tending to show a legitimate explanation at stage two of the *McDonnell Douglas-Burdine* framework. As this Court has observed, the defendant has "an incentive to persuade the trier of fact that the employment decision was lawful" and thus "normally will attempt to prove the factual basis for its explanation" (*Burdine*, 450 U.S. at 258).

On the other hand, a rule that required the burden of proof on causation to shift to the defendant would present severe problems in defining the "threshold" showing that the plaintiff would have to make before such a shift would take place. The lower courts that have endorsed burden-shifting have generally required the plaintiff to show that an illegal motive was a "significant factor" or a "motivating factor" in the decision before shifting the burden to the defendant (see page 12, *supra*). If this means the plaintiff must show that the illegal motive made a difference to the outcome—that it was a necessary element of a set of conditions sufficient to yield the result—then this is just another way of saying that the plaintiff must show causation to establish liability: the position we endorse. But if it

means that discrimination must be present, but that it need not be such as to have contributed to the outcome, then it is hard to differentiate this from shifting the burden to the defendant merely upon the showing that there was "discrimination in the air." Other possible formulations of the threshold showing—such as that there is "some evidence" of causation—would also involve radical departures from established formulations for apportionment of the burden of proof in civil litigation. There are no principles that can be derived from the language of Title VII, its legislative history, or common law precedent that instruct how much evidence the plaintiff must produce—short of the traditional preponderance standard—before the burden shifts. Accordingly, there is no legal justification for treating the plaintiff's proof of causation "differently from other ultimate questions of fact." *Aikens*, 460 U.S. at 716.

## II. A DEFENDANT MAY LIMIT THE PLAINTIFF'S REMEDY BY SHOWING THAT THE EMPLOYMENT DECISION WOULD HAVE BEEN THE SAME WITHOUT THE ILLEGAL CAUSE

Although causation is a necessary element of liability under Title VII, and although the plaintiff bears the burden of persuasion on this issue as on all other elements of liability, it does not follow that the plaintiff in a disparate treatment action must necessarily bear the burden of persuasion of showing that she is entitled to the fullest measure of relief.

In *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, *supra*, the plaintiff alleged that he was not rehired as a teacher because he had engaged in constitutionally protected speech. This Court held that "the burden was properly placed upon" the plaintiff "to show that his conduct was constitutionally protected," and that this conduct "was a 'motivating factor' " in the school board's decision (429 U.S. at 287 (quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. at 270-271 & n.21)). As we understand it, a "motivating factor" is simply a "cause" as that term is defined by the common law—*i.e.*, a

necessary element in a set of factors that are jointly sufficient to produce the outcome. See *Mt. Healthy*, 429 U.S. at 286 ("A borderline or marginal candidate should not have the employment decision resolved against him because of constitutionally protected conduct."); see also *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 395 (1983) (General Counsel of NLRB has burden of showing that "antiunion animus contributed to the employer's decision to discharge an employee").

The Court in *Mt. Healthy*, however, further held that the defendant may attempt to convince the trier of fact "that it would have reached the same decision \* \* \* even in the absence of the protected conduct" (429 U.S. at 287). The Court in effect qualified the result that would have obtained under the common law's sufficiency standard by allowing the defendant to show that the plaintiff would obtain an undeserved windfall if he received back pay for the failure to place him in a job which would not have been his in any event. See *id.* at 285; see also *Transportation Mgmt. Corp.*, 462 U.S. at 401 (employer shown to have acted at least in part out of antiunion animus has burden to show that "he would have acted in same manner for wholly legitimate reasons").<sup>9</sup>

Similarly, Title VII gives a defendant the opportunity to prove that it would have reached the same employment decision in the absence of an illegal cause. Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), reveals that Congress had the same concern

<sup>9</sup> *Mt. Healthy's* reluctance to award the full measure of relief in circumstances where the common law would have imposed liability—and the full measure of damages—may perhaps be explained by the fact that the common law was usually concerned with awarding compensation for discrete harms incurred in the past, whereas *Mt. Healthy*, *Transportation Mgmt.*, and Title VII are concerned with on-going employment relationships. Just as the common law is reluctant to award specific enforcement of an employment contract (see *Restatement (Second) of Contracts* § 367 (1981)), so the Court and Congress have been reluctant to require an employer to hire, reinstate, or promote an employee who is not qualified to perform the employer's work, even if the employee has been the victim of intentional discrimination at the hands of the employer. Also, because of the on-going nature of the employment relationship, injunctive relief provides a meaningful form of redress here, which is not true in the case of discrete injuries incurred in the past.

as the Court in *Mt. Healthy*: that a plaintiff should not be placed in a better position than she would have been in the absence of an illegal motive. This section provides that, if a court finds that liability is established, it may "order such affirmative action as may be appropriate." But Section 706(g) goes on to provide that the court may not order "hiring, reinstatement \* \* \* promotion \* \* \* [or] back pay" if the court finds that employment decision was "for any reason other than discrimination." In other words, in cases where there are multiple sufficient causes for the employment decision, and one of those causes is a set containing only nondiscriminatory motives, Section 706(g) provides that reinstatement and backpay may not be awarded, because the set of sufficient nondiscriminatory motives was a "reason other than discrimination."

Because Section 706(g) deals with the question of remedies, as distinguished from the elements of a Title VII violation, it is proper to place the burden on the defendant to prove that a given employment decision would have been the same in a discrimination-free environment. See *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 447 (1986) (plurality opinion); *Transportation Mgmt. Corp.*, 462 U.S. at 402. If the defendant makes such a showing, the plaintiff is made whole by an award of attorney's fees and an injunction against future discrimination. In effect, the defendant is ordered to cease discriminatory activity, which enhances the plaintiff's employment opportunities in the future. But the defendant need not hire, reinstate, promote or provide backpay to the plaintiff, because such relief would "place an employee in a better position as a result of the [defendant's discriminatory conduct] than he would have occupied had [the defendant] done nothing." *Mt. Healthy*, 429 U.S. at 285.<sup>10</sup>

<sup>10</sup> The defendant's burden of proof under Section 706(g), just as the plaintiff's burden under Section 703, should be governed by the "preponderance of the evidence" standard. The "preponderance" standard is the normal rule in civil litigation, and there is no reason that a different rule should apply under the civil rights laws. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). Cf. *Kungys v. United States*, No. 86-228 (May 2, 1988), slip op. 14



Although the Court has not expressly endorsed this reading of Section 706(g), it has reached analogous conclusions in related Title VII contexts. See *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 404 n.9 (1977) (noting that if a "company's failure even to consider \* \* \* applications was discriminatory," then "the company was entitled to prove at trial that the respondents \* \* \* were not qualified and would not have been hired in any event"); *International Bhd. of Teamsters v. United States*, 431 U.S. at 359 (once class liability is found, individual relief can be limited if defendant shows that he would have made the challenged decision for lawful reasons); see also *Fadhl v. City & County of San Francisco*, 741 F.2d 1163, 1167 (9th Cir. 1984) (Kennedy, J.) ("the burden of proof is on the employer \* \* \* and to avoid back pay the employer must show that, absent the discrimination, the applicant \* \* \* would not have been hired"); *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (Scalia, J.) ("it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish \* \* \* the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor"). Thus, Section 706(g) should be construed to allow the defendant in a disparate treatment case to prove that, because the adverse employment decision would have been made in any event for legitimate, nondiscriminatory reasons, the plaintiff will be made whole by an award of attorney's fees and an injunction against future discrimination.

### III. STEREOTYPING, WITHOUT MORE, DOES NOT CONSTITUTE A VIOLATION OF TITLE VII

The district court rested its finding of intentional discrimination on the presence of comments reflecting sexual "stereotypes" in petitioner's decision-making process—*i.e.*, comments made

("the difficulty of establishing 'but for' causality, by clear, unequivocal, and convincing evidence many years after the fact, is so great that we cannot conceive that Congress intended such a burden to be met"). Thus, the lower courts in this case clearly erred in using a "clear and convincing" evidence standard in this regard (Pet. App. 25a, 59a).

by some evaluating partners about how women should or most women do comport themselves—coupled with a finding that petitioner did nothing to disavow these comments or to ensure that they did not affect the ultimate decision. These findings, we believe, are insufficient to establish liability under Title VII. Title VII, as we have noted above, is not a "thought control bill"; "[t]here must be a specific external act, more than a mental act." 110 Cong. Rec. 7254 (1964) (Sen. Case). See also *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (sexual harassment violates Title VII only if it is sufficiently severe to alter the conditions of the victim's employment). Stereotyping, as defined by the courts below, is the harboring and perhaps expression of certain opinions about behavior appropriate to or typical of certain groups. The harboring and expression of such views, by itself, does not violate Title VII. As relevant here, Title VII bans discriminatory treatment because of sex, not stereotypical thoughts.

Of course, this does not mean that stereotyping is irrelevant under Title VII. Such opinions and their expression are generally offensive to members of the group so characterized, even where the stereotype may not be intrinsically demeaning. And the reason for that, of course, is that persons properly resent being judged as members of groups rather than as individuals. The offense is compounded where the stereotype is unflattering, or suggests that the members of the group possess undesirable characteristics. Such statements are highly probative evidence of discriminatory intent. Indeed, the repeated utterance of highly offensive stereotypes might in appropriate contexts be enough in itself to constitute a form of racial or sexual harassment justifying the imposition of Title VII liability. See *Henson v. City of Dundee*, 682 F.2d 897, 901-902 & n.4 (11th Cir. 1982).

But where the claim is made, as it is here, that there has been discrimination because of sex in making a particular employment decision, more is needed than the showing that those who made the decision harbored or even gave voice to stereotyping opinions. Those opinions must be shown in some way to have disadvantaged respondent in her request for promotion and



thus have played a causal role in her being denied that promotion. As we have said, even a positive or neutral stereotype will often be offensive to its victim, but the bigot (and the harboring of stereotypes is a pretty good definition of bigotry) may in fact be disposed *in favor*, for stereotypical reasons, of an unsuccessful applicant for a position. In order to make out a case of discriminatory denial it must be shown that the stereotyping was part of a motive which improperly disadvantaged the applicant. Although in many instances stereotyping will provide strong evidence of discrimination, a court may not jump over the intermediate step of showing discriminatory disadvantage and pass directly from stereotyping to liability.

In short, a narrow focus on "stereotyping" obscures the crux of liability under Title VII—disparity of *treatment* because of sex or some other proscribed criterion. An employer may of course legally base employment decisions on concerns that an employee is too aggressive, abrasive, or profane. But in doing so, the employer must apply its standard evenhandedly; "aggressiveness," "abrasiveness" and "bad language" cannot be the bases for rejecting female, but not male, candidates. In all events, use of and controversy over the meaning of the term "stereotype" should not distract the parties and the court from the ultimate issue: whether the plaintiff can show by a preponderance of the evidence that she was denied an employment opportunity because of her sex.

#### IV. THE CASE SHOULD BE REMANDED FOR RECONSIDERATION IN LIGHT OF THE CORRECT LEGAL STANDARDS

As the foregoing discussion suggests, we believe that both the court of appeals and the district court committed fundamental legal errors. The court of appeals held (Pet. App. 22a-23a, 25a) that the burden of persuasion on causation shifts to the defendant at the liability stage, and requires the defendant to prove by clear and convincing evidence that the same decision would have been made notwithstanding the presence of discriminatory animus. The district court also appears to have adopted (*id.* at

54a) an improper standard of causation, and may have endorsed a theory of liability based on the mere presence of "stereotyping" in the decision-making process. The district court never found that discrimination caused petitioner's decision—*i.e.*, that respondent was treated differently because she is a woman. Hence, the case should be remanded to the district court to determine whether discrimination, as evidenced *inter alia* by stereotyping comments, caused the decision not to promote respondent.

There may be sufficient evidence in the record to support a finding that an illegal motive caused petitioner's employment decision. The district court found that the head partner at the office where respondent worked was the person "responsible for telling [respondent] what problems the Policy Board had identified with her candidacy" (Pet. App. 52a). This partner, in counseling respondent about what she should do to overcome the reservations of the Policy Board, told respondent "to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" (*ibid.* (footnote omitted)). This evidence could support a finding that the decision to deny respondent partnership was caused, at least in part, by an impermissible motive.<sup>11</sup> Comments made by evaluating partners—*e.g.*, that respondent should take a "course at charm school" (*id.* at 51a) and that she is "macho" (*id.* at 52a)—are consistent with this assessment of the reasons for the Policy Board's decision. These comments, whether termed "stereotypes" or something else, may be appropriately considered as evidence that respondent's sex determined the outcome of the evaluation process and that she was treated less favorably because she is a woman. See *Furnco Constr. Corp. v. Waters*, 438 U.S. at 578 (evidence of discriminatory intent may "take a variety of forms").

<sup>11</sup> The Equal Employment Opportunity Commission has noted that the expression of stereotypical attitudes about whether women should be aggressive is evidence of disparate treatment because of sex. See Dec. No. 74-15, 1983 CCH EEOC DEC ¶ 6394 (Aug. 7, 1973).

The district court found that “[d]iscriminatory stereotyping of females was permitted to play a part” in the partnership decision (Pet. App. 58a). On the other hand, the district court stated that petitioner “had legitimate, nondiscriminatory reasons for distinguishing between [respondent] and the male partners with whom she compares herself” (*id.* at 48a). On remand, the district court should clarify its findings by asking the critical question under Title VII—did sex discrimination cause petitioner’s decision?<sup>12</sup> And the court should so find only if it believes that respondent showed that it is more likely than not that her sex was a necessary element of a set of reasons jointly sufficient to cause the decision. In other words, respondent will have established Title VII liability if the district court finds that she was rejected because of negative votes that were motivated by the view that she is too aggressive or abrasive *for a woman*.

<sup>12</sup>In answering this question, the district court will of course be addressing Judge Williams’ concern (Pet. App. 38a) that there may be no causal link between the stereotypical comments and petitioner’s employment decision.

## CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the district court for further proceedings. Respectfully submitted.

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IN THE  
**Supreme Court of the United States**  
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PRICE WATERHOUSE,  
v. *Petitioner,*  
ANN B. HOPKINS,  
*Respondent.*

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On Writ of Certiorari to the United States Court  
of Appeals for the District of Columbia Circuit

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**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL  
IN THE SUPPORT OF THE PETITIONER**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

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No. 87-1167

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PRICE WATERHOUSE,  
v. *Petitioner,*  
ANN B. HOPKINS,  
*Respondent.*

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**On Writ of Certiorari to the United States Court  
of Appeals for the District of Columbia Circuit**

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**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL  
IN THE SUPPORT OF THE PETITIONER**

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The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae in support of the Petitioner. The written consents of all parties have been filed with the Clerk of this Court.

**INTEREST OF THE AMICUS CURIAE**

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. Its gov-



erning body is a Board of Directors composed of experts and specialists in equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment opportunity programs and requirements. The members of EEAC are firmly committed to the principles of non-discrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to charges of discrimination pursuant to Title VII and the ADEA, EEAC's members have a strong interest in the issues presented here.

In this case, the district court found that there were legitimate, nondiscriminatory and nonpretextual reasons for the employment decision, and also that there was no showing by the plaintiff that assertedly sexually stereotypical statements played a *causal* role in the plaintiff's failure to be made a partner. The court of appeals, however, shifted the burden to the employer to prove by "clear and convincing" evidence that the unlawful factor was not the determinative one. This burden of proof is out of step with previous decisions of this Court holding that the burden of proof remains at all times with the plaintiff in a disparate treatment case. In addition, the use of the "clear and convincing" standard below was erroneous and contrary to previous decisions of this Court using the "preponderance of the evidence" standard.

Affirmance of the standards applied below would improperly shift the burden in Title VII, ADEA and other employment-related actions.

Because of its interest in the application of the nation's civil rights laws, EEAC has filed over 230 briefs as amicus curiae in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has participated in several cases involving the burden of proof in discrimination cases, including *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Connecticut v. Teal*, 457 U.S. 440 (1982) and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

#### STATEMENT OF THE CASE

The plaintiff in this case was a senior manager who was informed that she would not be selected as a partner by Price Waterhouse. The decision not to select plaintiff as a partner came at the end of a comprehensive process. Price Waterhouse is one of the "big eight" accounting firms. When the trial began in this case, it had 662 partners working in 90 offices around the country. (Pet. App. 3a).<sup>1</sup> Potential partners are nominated by a local office. The names and accompanying performance appraisals of all nominees are circulated to all partners, who are invited to comment on candidates. (Pet. App. 5a).

<sup>1</sup> "Pet. App." references are to the appendix to the petition for certiorari.

Long or short form evaluations are filled out, depending on the degree of knowledge of the candidate. All nominees are ranked against other recent partnership candidates in 48 categories. (Pet. App. 41a).

Recommendations for partnership are made to the Policy Board by its Admissions Committee. The Board then votes on which candidates are to be included on the partnership ballot. A partnership-wide election then is held. Those not placed on the ballot are informed of the Board's reasons for rejecting or postponing their candidacies. (Pet. App. 5a).

The district court below found that:

Because the plaintiff had considerable problems dealing with staff and peers, the Court cannot say that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations. Even supporters of the plaintiff viewed her style as somewhat offensive and detrimental to her effectiveness as a manager.

(Pet. App. 59a). One fourth of the thirty-two partners who evaluated the plaintiff opposed her admission. (Pet. App. 6a). Three others recommended that she be held for reconsideration; and eight said they had insufficient information to form an opinion. (*Id.*).

The district court found that "[m]any of the comments from evaluating partners centered on Hopkins' apparent difficulties with staff, and both supporters and opponents of her candidacy characterized her as sometimes overly aggressive, unduly harsh, impatient with staff and very demanding." (*Id.*). Indeed, plaintiff had been counseled about these shortcom-

ings and indicated "that she agreed with many of these criticisms." (Pet. App. 46a).

On the other hand, the district court stated that Hopkins was "qualified for partnership consideration", as she was "exceptionally successful in garnering business for the firm." (Pet. App. 4a). In addition, there were a number of negative comments that the courts below found were sex-related. For example, statements were made suggesting she needed a course in "charm school", that she may "have over-compensated for being a woman", or that she used profanity. (Pet. App. 6a). Other examples of allegedly discriminatory statements are set out in the decisions below.

In evaluating plaintiff's arguments that the decision to deny her partnership was discriminatory, the district court held: "that the complaints about the plaintiff's interpersonal skills were not fabricated as a pretext for discrimination" (Pet. App. 46a-48a); and that "Price Waterhouse had legitimate, nondiscriminatory reasons for distinguishing between the plaintiff and the male partners with whom she compares herself" (Pet. App. at 48a). Nevertheless, the district court found that sex-related comments were made about plaintiff, relying on the testimony of an "expert" in stereotyping who "did not purport to be able to determine whether or not *any particular reaction* was determined by the operation of sex stereotypes." (Pet. App. 53a) (emphasis added).

The Court then found:

[W]hile stereotyping played an undefined role in blocking plaintiff's admission to the partnership in this instance, it was unconscious on the part of



the partners who submitted comments. *The comments of the individual partners and the expert evidence of Dr. Fiske do not prove an intentional discriminatory motive or purpose.*

(Pet. App. 54a) (emphasis added).

But the district court also stated that although this stereotyping may have been unconscious, Price Waterhouse maintained a system that gave weight to such criticism. Thus, the court held that the plaintiff was the victim of "omissive and subtle" discrimination. (Pet. App. 56a). Stating that there was a "mixture of legitimate and discriminatory considerations," the court held that the plaintiff was entitled to relief "unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination." Pet. App. 59a.

The "clear and convincing" burden placed on the employer by the district court was affirmed by the court of appeals. The court of appeals noted that the "courts have struggled to resolve the difficult questions of causation that arise in mixed-motive cases such as this." (Pet. App. 22a).<sup>2</sup> It then reviewed the confusion in the court of appeals decisions. (Pet. App. 20a-24a).<sup>3</sup> It held that when the plaintiff

<sup>2</sup> In its brief to this Court, Price Waterhouse properly disputes the characterizations of the courts below that this is a "mixed motive" case, as did Judge Williams' dissent, discussed below. The Amicus strongly concurs with those arguments.

<sup>3</sup> Indeed, as the petition for a writ of certiorari in this case shows, "the courts of appeals have devised no fewer than five inconsistent ways to resolve cases in which it is argued that the defendant acted on the basis of both a lawful and an unlawful motive." Cert. Pet. 13.

has shown that impermissible bias was a part of the employment decision:

"We chose . . . to place the burden upon the employer to show, by 'clear and convincing evidence,' that the unlawful factor was *not* the determinative one."

Pet. App. 23a, citing *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (emphasis in original). It is this ruling that is addressed by this brief.

In dissent, Judge Williams criticized the majority's reliance on assertedly stereotypical language in order to find a violation, stating that this "evidence of sexual stereotyping is carefully culled from a mass of critical comments on the plaintiff's abrasiveness with no sex link whatever." Pet. App. 29a. The dissent stated that these negative comments about plaintiff's partnership qualifications were well founded in fact, represented standards applied to men and women alike, and were the true basis of the firm's decision. Pet. App. at 29a-30a. Applying the standards of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), Judge Williams criticized the majority for improperly putting upon the defendant the burden of proving that its reasons were not pretextual. Pet. App. 30a.

Further, in vivid contrast to the majority's reliance upon an "expert" in sex stereotyping who was not familiar with the specific facts of this case, Judge Williams examined in detail the effect this alleged stereotyping played in the partnership decision and determined that the record did not support the majority's conclusions. Pet. App. 31a-38a.



Judge Williams also criticized the majority for calling this a "mixed motive" case as "'discrimination has not been specifically attributed to the employment decision of which the plaintiff complains'", Pet. App. 38a, citing *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983). Since there was not enough evidence to support a verdict for the plaintiff "under any established approach to Title VII liability," Judge Williams would not have found a violation. Pet. App. 38a-39a.

#### SUMMARY OF ARGUMENT

The decisions below improperly shifted the burden to the employer to prove by "clear and convincing" evidence that the unlawful factor was not the determinative factor in plaintiff's failure to attain partnership. Under Title VII's language, the plaintiff must prove that she was adversely affected "because of" her sex—a finding which the district court specifically found could not be made in this case. As the courts have recognized, employment decisions are complex, and an undeserving plaintiff should not prevail merely because the record may reveal an instance of illegal motivation which the plaintiff cannot prove had a causal connection to the denial of a job opportunity.

Thus, this Court has developed a "sensible, orderly" method of allocating the burden of proof. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). Even if the plaintiff can demonstrate that an illegal motive may be present, the employer can rebut this evidence with evidence that its decision was based upon legitimate considerations. At this point, the initial *prima facie* presumption "drops

from the case," the district court is to examine all the facts developed at trial, and the "plaintiff retains the burden of . . . persuading the court that a discriminatory reason *more likely* motivated the employer . . ." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (quoting *Burdine*, 450 U.S. at 248) (emphasis added).

There are sound, practical reasons for allocating the proof in this manner. Often it can be shown that the person who made a discriminatory statement was not involved to a sufficient degree in the employment decision. *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1412-13 (7th Cir. 1984). In other cases, the individual will lack the qualifications, or cannot show that there was an opening available for the position sought. Other times, as in the instant case, the employer's statements cannot be shown to be pretextual, or the plaintiff cannot establish a causal connection between the alleged discrimination and the employer's conduct.

This Court's decisions in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977), and *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393 (1983) do not require a different result. Neither was a Title VII case nor involved a statutory scheme which bars relief unless the plaintiff can show that a employment benefit was denied "because of" discrimination. Also, *Transportation Management* was based upon the fact that the NLRB viewed the employer's burden as establishing an "affirmative defense" (462 U.S. at 402-03), a standard never used in allocating Title VII's evidentiary burdens. Finally, in any event, inasmuch as both *Mt. Healthy* and *Transportation Manage-*

ment used the “preponderance of the evidence” standard, the unexplained use of the “clear and convincing” standard below cannot stand.

### ARGUMENT

**TO PREVAIL IN A TITLE VII “MIXED MOTIVE” CASE, THE PLAINTIFF MUST DEMONSTRATE THAT THE DISCRIMINATORY MOTIVATION WAS THE DETERMINING (“BUT FOR”) FACTOR IN THE CHALLENGED EMPLOYMENT DECISION.**

**I. The Language Of Title VII Requires That To Establish Illegal Discrimination And To Receive Any Relief, The Plaintiff Must Prove The Employer’s Action Was Taken “Because Of” The Plaintiff’s Sex, Race Or Other Protected Characteristic.**

By placing the burden on the employer to prove by “clear and convincing” evidence that the unlawful factor was not the determinative factor in an employment decision, the courts below improperly shifted the Title VII burden of proof onto the employer and ignored established precedent rejecting the clear and convincing standard.

In order to prevail in a Title VII case, the plaintiff must prove that the employment decision was caused by illegal discrimination. Section 703(a) of Title VII prohibits discrimination against an individual “because of” that person’s race, color, religion, sex or national origin.<sup>4</sup> See *McQuillen v. Wisconsin*

<sup>4</sup> The full text of Section 703(a), 42 U.S.C. Sec. 2000e-2(a) (1982) states as follows:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

*Education Association Council*, 830 F.2d 659, 664 (7th Cir. 1987). Additionally, proof of causation is required by Title VII’s remedial provision. Section 706(g), 42 U.S.C. Sec. 2000e-5(g), forbids the courts from giving relief (such as hiring, reinstatement, promotion, or back pay), if that individual was refused employment, advancement or was suspended or discharged “for any reason other than discrimination.”

Obviously, in some cases the evidence of an employer’s discriminatory animus may be so strong as to “effectively preclude an employer from contending that the same decision would have been made regardless of the employer’s motivation.” See *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985). In many instances, like the instant case, however, there may be many reasons for an employment decision. Thus,

employment decisions are often complex, and, where dozens of factors are involved in evaluation of an employee, the fact that one such factor is impermissible does not necessarily preclude the contention that the adverse employment action would have been taken regardless of the impermissible factor.

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privileges of employment, *because of* such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual’s race, color, religion, sex, or national origin.

(Emphasis added.)



*Blalock*, 775 F.2d at 712. See also *Bibbs v. Block*, 778 F.2d 1318, 1330-32 (8th Cir. 1985) (Ross, J., dissenting), in which Judge Ross discusses in detail the Title VII requirement that the plaintiff prove that the adverse action against the plaintiff was taken "because of" the discriminatory motive.

Because of this statutory language, Title VII places the burden on the plaintiff to show that some statutorily proscribed factor (such as race or sex) was a "but for" cause of the employer's conduct. *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273, 283 n.10 (1976). Further, the Court consistently has resisted attempts by plaintiffs to shift the burden of proof in Title VII cases to the employer and has made clear that to prevail against the plaintiff's prima facie case, the employer is not required "to prove absence of discriminatory motive." *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 24 (1978).

The Court has developed "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 577 (1978). As the Court has explained, the specific requirements "necessarily will vary" with the facts of each case. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 n.13 (1973). In addition, however, the ultimate burden of proving intentional discrimination *never* shifts from the plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Thus, once the employer has explained its conduct, "the factual inquiry proceeds to a new level of specificity," *id.*, at 255, and the plaintiff's burden of proving pretext merges with the ultimate burden of proof. *Id.*, at 256.

## II. Even Assuming That Discriminatory Motive Can Be Shown, Once The Employer Provides A Legitimate Nondiscriminatory Reason For Its Conduct, The Plaintiff Must Prove By A Preponderance Of The Evidence That The Misconduct Made A Difference In The Employer's Decision.

As shown, a Title VII plaintiff may establish a prima facie case of discrimination either by direct evidence, or by the *McDonnell Douglas* construct permitting an inference of intentional discrimination. The central focus of the inquiry is always whether "[t]he employer simply [is treating] some people less favorably than others *because of* their race, color, religion, sex, or national origin." *Teamsters v. United States*, 431 U.S. at 335 n.15 (emphasis added). If the employer's actions remain unexplained, the presumption arises that they are "more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S. at 577.

But rather than adopt hard-and-fast, inflexible requirements, the court has required a realistic application of this legal formula. As explained in *Furnco*:

... [W]e know from our experience that more often than not people do *not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting*. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* [emphasis in original] reason, based his decision on an impermissible consideration, such as race.

438 U.S. at 577 (emphasis added).<sup>5</sup>

<sup>5</sup> As the Court has noted, "[Title VII] was not intended to 'diminish traditional management prerogatives.'" *Burdine*,



After the district court has tried the case and has all the evidence before it, this Court has cautioned against becoming bogged down in a mechanistic application of the *McDonnell Douglas* standards and "unnecessarily evad[ing] the ultimate question of discrimination, *vel non*." See *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983). Once the employer introduces evidence that it acted for "a" legitimate, nondiscriminatory reason (*Aikens*, 460 U.S. at 714), "the factual inquiry proceeds to a new level of specificity." *Id.*, at 715, citing *Burdine*, 450 U.S. at 255. *Aikens* showed that, despite his qualifications, whites were promoted above him. In addition: "He introduced testimony that *the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular*." 460 U.S. at 714 n. 2 (emphasis added). Thus, even in the face of apparently direct evidence of anti-black animus, this Court stated that the initial *prima facie* presumption of discrimination "drops from the case", 460 U.S. at 715.

Thus, with a full record before it, the district court should look at "all the evidence". 460 U.S. at 715. As in "other civil litigation," the court should decide "disputed" questions of fact. 460 U.S. at 715-16.

"The plaintiff retains the burden of persuasion . . . [H]e may succeed in this either directly by persuading the court that a discriminatory reason *more likely* motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

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450 U.S. at 259 (quoting *McDonnell Douglas*, 411 U.S. at 207). See also, *United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979).

460 U.S. at 716, citing *Burdine*, 450 U.S. at 256. Accordingly, it is clear that even where direct proof of discriminatory intent has been shown, when the employer introduces evidence showing a legitimate reason for its conduct, the plaintiff cannot prevail absent a showing that it was the discriminatory reason that "more likely motivated the employer."<sup>6</sup> The courts below thus were patently in error by placing the burden on the employer to prove, by clear and convincing evidence, that the unlawful factor was not the determinative one.

Moreover, there are important, practical reasons why a plaintiff who cannot meet this burden of proving causation should not be able to prevail merely by showing that someone in a supervisory capacity "harbored some discriminatory motivation." *McQuillen v. Wisconsin Education Association Council*, 830 F.2d 659, 664 (7th Cir. 1987). The employee also "must establish that the discriminatory motivation was a determining factor in the challenged employment decision in that the employee would have received the job absent the discriminatory motivation." *Id.*

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<sup>6</sup> This Court has rejected arguments that this places an impermissible burden on the plaintiff. As explained in *Burdine*, the employer's reasons must be "clear and reasonably specific." 450 U.S. at 258. In addition, "the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint." *Id.* at 258. Indeed, in the district court below, Judge Gesell stated: "In the course of this trial, Price Waterhouse has been very forthcoming in providing information on its partnership se[le]ction process." Pet. App. 49a.

For example, the courts have recognized that while the record in a particular case may establish that a statement was improperly race- or sex-based, it often can be shown that the person who made the statement was not involved to a sufficient degree in the decision at issue. See *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1412-13 (7th Cir. 1984); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979); and *Lucy v. Manville Sales Corp.*, 674 F. Supp. 1426 (D. Colo. 1987). Under these cases, the employee's failure to establish a "causal connection" between the alleged discriminatory conduct and the employer's action ultimately was sufficient to defeat the discrimination claim also. In addition, there often will be overriding reasons that a person will not be given an employment opportunity, such as lack of qualifications, lack of openings, or other reason showing the individual would not have been hired.

This case provides an apt example. Here, an accounting firm of immense size had the difficult task of identifying and choosing who will be selected for partnership. Evaluations of a large number of candidates are done by a large number of existing partners. While isolated improper statements allegedly were made, those statements should not be determinative where there are overriding, legitimate reasons for not making the individual a firm partner.

Partnership, of course, is much more than an ordinary employment relationship. Numerous subjective concerns necessarily are involved, such as professional standing, outside activities, adequacy of billings, and contributions to the success and reputation of the firm. Cf. *Hishon v. King & Spaulding*, 467 U.S. 69, 79-81, and n.3 (1984) (Powell, J., con-

curing). One of the most important factors is the ability to get along with other partners and members of the staff—the very concerns upon which Price Waterhouse determined not to make the plaintiff a partner.

Here, the district court held that it could not say that she would have been selected for partnership if the Policy Board's decision had not been tainted by sexually biased evaluations. Pet. App. 59a. It also held that "[t]he comments of the individual partners and the expert evidence by Dr. Fiske do not prove an intentionally discriminatory motive or purpose." Pet. App. 54a. Judge Gesell further ruled that "the complaints about the plaintiff's interpersonal skills were not fabricated as a pretext for discrimination." Pet. App. 46a. Given those holdings, it was clear that the employer had met its burden of rebutting the plaintiff's prima facie case. Since the plaintiff failed to prove that she would have been chosen "but for" the alleged discriminatory conduct, the suit should have been dismissed.<sup>7</sup>

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<sup>7</sup> The district court's reliance on so-called expert testimony of sex stereotyping is troublesome, inasmuch as Judge Gesell found that "Dr. Fiske did not purport to be able to determine whether or not any particular reaction was determined by the operation of sex stereotypes. However, she did identify comments that she *believed* were influenced by sex stereotypes." Pet. App. 53a. (Emphasis added). The determination of whether race or sex played a part in a particular employment decision would seem to be the ultimate issue for the district court, and an inappropriate issue on which to allow a purported "expert" to express a belief, particularly in view of Dr. Fiske's failure to examine any of Price Waterhouse's partners or their particular reactions to Ms. Hopkins.

Equally disturbing is the district court's apparent deference to technical research (Pet. App. 52a-53a and n.10). The dis-



**III. *Mt. Healthy* And *Transportation Management* Do Not Shift The Burden To The Employer In A Title VII "Mixed Motive" Case. In Any Event Those Decisions Only Impose A Burden To Prove By A "Preponderance" Of The Evidence Rather Than By "Clear And Convincing" Evidence.**

The plaintiff's opposition to the writ of certiorari erroneously states that "the district court then followed settled precedent and inquired whether Price Waterhouse had proved that Hopkins would have been rejected even in a bias-free setting. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977); *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983)." Op. cert. at 3. The plaintiff is wrong for at least three reasons. First, the district court did not even mention those decisions. Second, those decisions are not applicable to Title VII cases. Third, both courts below improperly imposed a "clear and convincing" standard in this civil litigation—a burden that is clearly at odds with the "preponderance" standard previously used by this Court in the *Mt. Healthy* line of cases.

trict court came dangerously close to taking judicial notice of research opinion which was not subject to deposition, cross examination and the other rigours of trial. Inasmuch as "societal discrimination" is not sufficient for proof under Title VII (See generally, *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842, 1847-49 (1986) (Opinion of Powell, J.)), use of generalized research opinion seems even more inappropriate in a case where there has been such extensive discovery in the district court as to the specific employment decisions of a particular employer. A much more appropriate and valid analysis of the evidence of this particular case was undertaken by Judge Williams in his dissenting opinion below. Pet. App. 28a-39a.

Neither *Mt. Healthy* (a constitutional case) nor *Transportation Management* (a National Labor Relations Act case) involved statutory language such as found in Title VII which imposes upon the plaintiff the burden of proving that the discrimination was "because of" the employer's discrimination. Indeed, neither decision even discussed the language of Title VII upon which the Title VII statutory burden of proof scheme is based.

As previously shown, this Court's Title VII cases, for good reason, have never moved the burden of proof to the employer. Instead, under Title VII, even if the plaintiff can establish some direct evidence of discriminatory motive, once the employer articulates a legitimate nondiscriminatory reason, the initial prima facie presumption "drops from the case," 460 U.S. at 715 (quoting *Burdine*, 450 U.S. at 255, n.10) and the plaintiff retains the burden of persuasion that "a discriminatory motive *more likely* motivated the employer." *Aikens*, 460 U.S. at 716 (quoting *Burdine*, 450 U.S. at 256) (emphasis added). This statutory difference by itself is sufficient to distinguish the *Mt. Healthy* line of cases.

In addition, *Transportation Management* was grounded in large part upon the NLRB's construction of the National Labor Relations Act that the employer would have an "affirmative defense" (462 U.S. at 402-03) of proving by a preponderance of the evidence that it would have reached the same decision even if it had not been motivated by an improper motivation. This Court has never construed the employer's Title VII burden as involving an "affirmative defense". Thus *Transportation Management* is inapplicable to Title VII. Indeed, it was to correct a



similar error that this Court issued its *per curiam* decision in *Board of Trustees of Keene St. College v. Sweeney*, 439 U.S. 24 (1978) and made clear that the employer cannot be required to prove the absence of discriminatory motive.

Further, *Transportation Management* held that the Court's Title VII *Burdine* decision was "inapposite", noting both that the plaintiff in *Burdine* bore the "ultimate burden" of persuading the trier of fact that the defendant committed discrimination, and that no illegal motivation was involved in *Burdine*. As shown above, the Court's *Aikens* decision clarified that the plaintiff's Title VII burden is to prove that the discriminatory motive "more likely" motivated the employer.

What is relevant from *Mt. Healthy* is the Court's concern that an employee who engaged in protected constitutional conduct should not be reinstated if there were other legitimate reasons for not doing so, particularly in light of the "significant," "long-term consequences" of the tenure decision at issue in that case. 429 U.S. at 286. The Court reasoned in *Mt. Healthy* that: "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." 429 U.S. at 285-86. As the Court stated in language directly applicable to the plaintiff here:

that same candidate ought not to be able, by engaging in such [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record. . . .

429 U.S. at 286.

Finally, in the event that the Court should find that its *Mt. Healthy* line of cases should be applied to Title VII, it then should reject the "clear and convincing" standard applied by the courts below. Neither court offered any statutory or decisional authority for their unusual holdings, apparently relying on mere *ipse dixit* to establish the employer's ultimate burden of proof.

This Court consistently has held that a defendant may prevail if it can show "by a *preponderance of the evidence* that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287 (Emphasis added). The preponderance standard also was used in *Transportation Management* (462 U.S. at 402), and *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 416 (1979).

It is hornbook law that the "preponderance of the evidence" standard is the standard to be used "on the general run of issues in civil cases. . . ." *McCormick's Handbook of the Law of Evidence*, Second Ed., West Publishing Co., 1972, at p. 793. The "clear and convincing" standard is used only in "certain exceptional controversies" not applicable here. *Id.*, at 793, 796-98. And as the Court stated in *Aikens*, questions of fact in Title VII cases are to be decided "just as district courts decide disputed questions of fact in other civil litigation." 460 U.S. at 715-16.<sup>8</sup> Accordingly, whichever party bears the ultimate burden in this case, that burden may be met by satisfying the "preponderance of the evidence" standard.

<sup>8</sup> Accord, *Marek v. Chesney*, 473 U.S. 1, 10 (1985) (No evidence "that civil rights claims were to be on any different footing from other civil claims. . .").

**CONCLUSION**

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

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PRICE WATERHOUSE,  
*Petitioner,*

v.

ANN B. HOPKINS,  
*Respondent.*

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On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit

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**BRIEF FOR *AMICUS CURIAE***  
**AMERICAN PSYCHOLOGICAL ASSOCIATION**  
**IN SUPPORT OF RESPONDENT**

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**BRIEF FOR *AMICUS CURIAE*  
AMERICAN PSYCHOLOGICAL ASSOCIATION  
IN SUPPORT OF RESPONDENT**

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**INTEREST OF *AMICUS CURIAE***

The American Psychological Association ("APA"), a voluntary nonprofit, scientific, and professional organization with more than 70,000 members, has been the major association of psychologists since 1892. Among APA's major functions are the improvement of research methods, the dissemination of information regarding human behavior, and, as reflected in its Bylaws, the "advance[ment] of psychology as a science and profession."

APA contributes *amicus* briefs only where it has special knowledge to share with the Court. APA regards this as one of those cases. Psychologists have generated almost all the research on sex stereotyping, the single most important basis on which the courts below found the petitioner to have violated respondent's civil rights. APA wishes to inform this Court of scientific thought regarding stereotyping, particularly as it affects judgments of women in work settings. The APA has participated as *amicus* in many cases in this Court involving social science issues, including *Watson v. Fort Worth Bank & Trust*, No. 86-6139 (1988) (validation of subjective personnel evaluation devices); and *Lockhart v. McCree*, 476 U.S. 162 (1986) ("conviction-proneness" of "death-qualified" juries).

Petitioner and respondent have consented to the filing of this *amicus* brief.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

The question before this Court is whether, in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, where the plaintiff has satisfied the trier of fact that intentional discrimination affected the defendant's employment decision, the plaintiff must

also prove that the decision would have been made in her favor absent discrimination. Because the crucial finding of discrimination in this case was grounded on direct evidence that the employer's selection process "was impermissibly infected by stereotypical attitudes towards female candidates," *Hopkins v. Price Waterhouse*, 825 F.2d 458, 468 (D.C. Cir. 1987), the parties have focused a significant degree of attention on the issue of sex stereotypes. APA will leave it to them to argue the merits of the question presented but insofar as that question may be determined by the underlying issues of the scientific trustworthiness of the concept of sex stereotyping, APA wishes to inform this Court of the nature and validity of the concept and of the ways in which it may have "played a significant role," *id.* at 469, in the petitioner-employer's decision.

To convince this Court that the opinions below were erroneous, the petitioner consistently disparages sex stereotyping and the testimony of the social science expert, Susan Fiske, Ph.D., who appeared on behalf of Ms. Hopkins.<sup>1</sup> At best, petitioner concedes that the partners' comments at issue "might conceivably be taken as indicating that stereotypical thinking was sometimes present

<sup>1</sup> For example, petitioner places the term sex stereotyping within quotations, falsely implying that it is neologistic or unaccepted. See, e.g., Brief for Petitioner at 2. Petitioner characterizes as an "amorphous proposition" the court of appeals finding that the employer discriminated against the employee because of "stereotypical attitudes," *id.* at 14, and claims that the finding was derived from "intuitions about unconscious sexism—discernible only through an 'expert' judgment. . . ." *Id.* at 16-17. Petitioner seeks to discredit Dr. Fiske's testimony by labeling it as "gossamer evidence," *id.* at 19, and "intuitively divined." *Id.* at 40. It claims her conclusions were faulty because she never met Hopkins and only reviewed the partners' evaluations of her. *Id.* at 13. See also, *id.* at 19, 42. In sum, petitioner accuses the lower courts of basing a finding of intentional discrimination on "a chain of intuitive hunches about 'unconscious' sexism" which "were, in turn, magically transformed into evidentiary 'facts' by a shift in the burden of persuasion." *Id.* at 41.

'in the air' at Price Waterhouse . . . ." *Id.* at 45. But, petitioner's argument is that any finding of intentional sex discrimination is merely based on the peculiar and eccentric judgments of a purported expert who was inclined to discover sex stereotyping whether or not it actually existed in the minds and conduct of the partners at Price Waterhouse.<sup>2</sup>

Petitioner's view is reminiscent of the now indefensible position in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that feelings of inferiority expressed by blacks as a result of racial segregation were evoked "solely because the colored race chooses to put that construction upon it." *Id.* at 551. Almost 100 years later, petitioner essentially asks

<sup>2</sup> Of course, petitioner is now barred from challenging the qualifications of Dr. Fiske or the admissibility of the subject matter upon which she testified. The trial court stated that Dr. Fiske was a "well qualified expert, who has done extensive research and study in the field of stereotyping." 618 F. Supp. 1109, 1117 (D. D.C. 1985). The court of appeals said, "To the extent that Price Waterhouse believes Dr. Fiske lacked necessary information, the firm is in fact quarrelling with her field of expertise and the methodology it employs. Defendant, however, failed to challenge the validity of Dr. Fiske's discipline at trial and disavows any such challenge here." 825 F.2d 458, 467 (D.C. Cir. 1987). Nevertheless, *amicus* believes petitioner's claim that Dr. Fiske's testimony lacked validity because she did not personally interview Ms. Hopkins is scientifically naive and irrelevant. Petitioner confuses the work of research psychologists like Dr. Fiske with that of clinical psychologists who use interviews and other assessment devices to arrive at a diagnosis of a patient. The issue about which Dr. Fiske was asked to testify concerned the presence *vel non* of discriminatory stereotyping at Price Waterhouse, not the mental status of Ms. Hopkins. The proper focus, then, was on the conduct of petitioner's partners, reflected in their evaluations. Dr. Fiske brought precisely that focus when she evaluated the conditions at Price Waterhouse that evoke stereotyping and the judgments of its partners in light of the research literature on stereotyping. In any event, petitioner should have availed itself of the rules of evidence, see Fed. R. Evid. 702-705, and case law, e.g., *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923), at the trial level if it wanted to lodge the challenges it now makes here.



this Court to rule that any discrimination respondent experienced was largely, if not completely, due to her distorted perception of the conduct of her employers. That view is not supported by the extensive research literature on sex stereotyping, much of it in employment settings. Petitioner's persistent attack on the finding of the courts below concerning Dr. Fiske and on the subject matter on which she testified exposes a lack of sophistication and knowledge about the nature of scientific research in general and sex stereotyping in particular. APA hopes to provide a corrective to this attack.

The five decades of research on sex stereotyping is generally accepted within the scientific community as judged by commonly acknowledged criteria. Part I. This research indicates that stereotyping is part of the normal psychological process of categorization that under pertinent conditions, can lead to inaccurate generalizations about individuals often transformed into discriminatory behavior. Sex is a common basis for faulty categorizations, of which sex stereotypes are the product. The literature on sex stereotypes shows that people characterize women in a manner that undermines judgments about their competence. Evaluation of women's work performance is often attributed to factors other than ability, detrimentally affecting organizational rewards and career progress. In particular, women are likely to be penalized, especially when they act in ways perceived as violating sex-related expectations. Thus, sex stereotyping has a demonstrably negative and discriminatory effect on women in work settings. Part II.

Psychologists have identified the conditions that promote such discriminatory stereotyping in work settings. Those conditions were all present in petitioner's place of employment. Part III. Discriminatory stereotyping, however, can be prevented by adopting such methods as providing evaluators pertinent information, focusing attention on that information, and creating motivational in-

centives that indicate consensual disapproval of stereotyping. Petitioner failed to employ any of those methods. Part IV. *Amicus* concludes that sex stereotyping existed in petitioner's employment setting, was transformed into discriminatory behavior, and played a significant role in the decision of petitioner not to select respondent as a partner of the firm.

## ARGUMENT

### I. EMPIRICAL RESEARCH ON SEX STEREOTYPING HAS BEEN CONDUCTED OVER MANY DECADES AND IS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY

The extent to which a body of social science evidence has gained general acceptance within the scientific community is critical to its acceptance by the judicial system. See Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986); Melton, *Bringing Psychology to the Legal System: Opportunities, Obstacles, and Efficacy*, 42 AM. PSYCHOLOGIST 488 (1987). Although no uniform standard determines general acceptance of the status of research in the social or natural sciences,<sup>3</sup> acceptability can be ascertained by the application of several evaluative criteria.<sup>4</sup> The quality of empirical re-

<sup>3</sup> See, e.g., Black, *Evolving Legal Standards for the Admissibility of Scientific Evidence*, 239 SCIENCE 1508 (1988); Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980). See generally *Proposals for a Model Rule on Admissibility of Scientific Evidence*, 115 F.R.D. 84 (1987).

<sup>4</sup> The use of such criteria for evaluating social science research has been proposed by legal scholars trained in social science methodology and the uses and misuses of social science research by the courts. See, e.g., W. LOH, *SOCIAL RESEARCH IN THE JUDICIAL PROCESS* (1984); J. MONAHAN & L. WALKER, *SOCIAL SCIENCE IN LAW* (1985); Bersoff, *Social Science Data and the Supreme Court: Lockhart as a Case in Point*, 42 AM. PSYCHOLOGIST 52 (1987);



search and, by implication, its general acceptance in the scientific community, is established by the use of valid research methods, its support by a body of other research, its scrutiny through critical peer review in the relevant scientific community, and subsequent publication of that research in respected journals.

By far, the most important criterion is validity. Social scientists distinguish between two kinds of research validity—internal and external. See E. LIND, J. SHAPARD & J. CECIL, *EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW* (1981). Internal validity “refers to the trustworthiness of a piece of research on its own terms. . . . To have high validity, a study must rule out, or control for, competing hypotheses that may account for an observed state of affairs.” SOCIAL AUTHORITY, *supra* note 4, at 502. Scientific research is authoritative to the extent that it has employed research designs that minimize various known threats to internal validity. External validity refers to the extent to which research can be generalized across different people, different settings, and over time. The more often a study confirms prior research or is confirmed by subsequent research and the more often a body of research with different methodologies supports a common proposition, the less likely it is that chance fluctuations in the data, overlooked variables, or methodological anomalies account for the findings.

Thus, just as the law accords greater respect to legal principles enunciated by many different courts in different jurisdictions, so too does the trustworthiness and ac-

Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 ARIZ. L. REV. 51 (1988); Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986) [hereinafter SOCIAL AUTHORITY]; Monahan & Walker, *Social Science in Law: A New Paradigm*, 43 AM. PSYCHOLOGIST 465 (1988).

ceptance of scientific research increase as different studies yield essentially convergent results about the phenomenon at issue.

In this context one can evaluate the general acceptance of research on stereotyping in the scientific community. The scientific study of social stereotypes<sup>5</sup> has been an active field of inquiry for over five decades. See, e.g., Katz & Braly, *Racial Stereotypes of One Hundred College Students*, 28 J. ABNORMAL & SOC. PSYCHOLOGY 280 (1933). Stimulated by a now classic treatise, see G. ALLPORT, *THE NATURE OF PREJUDICE* (1954), psychologists have examined the cognitive, motivational, and behavioral foundations of stereotyping.<sup>6</sup> Research on sex stereotypes<sup>7</sup> has been an integral part of this voluminous literature:<sup>8</sup>

<sup>5</sup> The term “stereotype” was used in the printing trade in the early 1800’s but did not become part of the mainstream of social scientific thought until 1922. W. LIPPMAN, *PUBLIC OPINION* (1922).

<sup>6</sup> For reviews, see, e.g., J. DOVIDIO & S. GAERTNER, *PREJUDICE, DISCRIMINATION, AND RACISM* (1986); S. FISKE & S. TAYLOR, *SOCIAL COGNITION* (1984); Ruble & Ruble, *Sex Stereotypes in IN THE EYE OF THE BEHOLDER: CONTEMPORARY ISSUES IN STEREOTYPING* (A. Miller ed. 1982) [hereinafter Ruble & Ruble]; Ashmore & Del Boca, *Conceptual Approaches to Stereotypes and Stereotyping in COGNITIVE PROCESS IN STEREOTYPING AND INTERGROUP BEHAVIOR 1* (D. Hamilton ed. 1981); Cauthen, Robinson & Krauss, *Stereotypes: A Review of the Literature 1926-1965*, 84 J. SOC. PSYCHOLOGY 103 (1971).

<sup>7</sup> Although psychologists distinguish “sex” as biological and “gender” as the associated psychological states, Deaux, *Sex and Gender*, 36 *Ann. Rev. Psychology* 49, 51 (1985) [hereinafter *Sex and Gender*], the former will be used herein, consistent with the courts below.

<sup>8</sup> In the psychological literature between 1967 and 1982, there were 12,689 articles published on human sex differences, 3,621 articles on sex roles generally and 1,765 articles on sex role attitudes specifically. *Id.* at 50. A computer-assisted bibliographic search conducted for this brief found that from 1974-1987, 1,564 articles were published on stereotypes, with over 20% pertaining to sex.

Beliefs about the sexes have a history at least as long as the actual study of those differences, and perhaps longer if one includes statements by those philosophers and social commentators who predated the development of modern psychology.<sup>9</sup> The ways in which people think about women and men can be, and have been, considered from a variety of perspectives, from broad-based attitudinal surveys about the roles of women and men to specific evaluations of individual male and female performance.

*Sex and Gender*, *supra* note 7, at 65.

Early research generated many empirical demonstrations that different expectations for female and male behavior produce different and unequal judgments about men's and women's performance.<sup>10</sup> Research conducted in the past 15 years has systematically revealed the cognitive structure of sex stereotypes and the psychological processes by which they influence behavior, including behavior in the workplace.<sup>11</sup> See Parts II-III, *infra*.

<sup>9</sup> For a brief history of the philosophical and religious attitudes people have harbored about women, see Ruble & Ruble *supra* note 6 at 188-193.

<sup>10</sup> See, e.g., O'Leary, *Some Attitudinal Barriers to Occupational Aspirations in Women*, 81 *Psychological Bull.* 809 (1974); Rosenkrantz, Vogel, Bee, Broverman, *Sex-role Stereotypes and Self-Concepts in College Students*, 32 *J. CONSULTING & CLIN. PSYCHOLOGY* 287 (1968) [hereinafter *Sex-role Stereotypes*]; Pheterson, Kiesler & Goldberg, *Evaluation of the Performance of Women as a Function of their Sex, Achievement and Personal History*, 19 *J. PERSONALITY & SOC. PSYCHOLOGY* 114 (1971).

<sup>11</sup> See, e.g., A. EAGLY, *SEX DIFFERENCES IN SOCIAL BEHAVIORS A SOCIAL-ROLE INTERPRETATION* (1987); Deaux & Kite, *Gender and Cognition in WOMEN & SOCIETY: SOCIAL SCIENCE RESEARCH PERSPECTIVES* 92 (B. Hess & M. Ferree eds. 1986); Taylor, *A Categorization Approach to Stereotyping in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR* 83 (D. Hamilton ed. 1981) [hereinafter Taylor]; Heilman, *Sex Bias in Work Settings: The Lack of Fit Model* in 5 *RESEARCH IN ORGANIZATIONAL BE-*

Research on sex stereotypes clearly satisfies the essential criteria for general scientific acceptance.<sup>12</sup> As *amicus* will show, researchers on sex stereotypes have used an impressive diversity of empirical methodologies (including surveys and laboratory and field experiments), qualitative and quantitative measurement strategies in a variety of research settings (including the workplace), with a variety of subject populations (including managers who make selection decisions), to examine how people think about women and men and how their perceptions influence social behavior.<sup>13</sup> This body of research yields an internally valid pattern of consistent, mutually confirmatory findings as well as considerable convergence across time, about the judgmental and behavioral conse-

HAVIOR 269 (B. Staw & L. Cummings ed. 1983) [hereinafter *Sex Bias in Work Settings*].

<sup>12</sup> In addition to the crucial criteria of internal and external validity, for support that research on sex stereotyping has withstood scrutiny by anonymous expert peer reviewers of journal articles, see *supra* nn. 6, 8, 10-11, & 13 as well as Parts II-IV, *infra*. The applicability of research on sex stereotyping to legal issues is self-evident as this case makes clear. See also Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 *B. C. L. REV.* 345, 349-361 (1980) (reviewing research).

<sup>13</sup> See, e.g., S. BASOW, *GENDER STEREOTYPES: TRADITIONS AND ALTERNATIVES* (1986); C. TAVRIS & C. OFFIR, *THE LONGEST WAR: SEX DIFFERENCES IN PERSPECTIVE* (1977); Rosen, *Career Progress of Women: Getting In and Staying In* in *WOMEN IN THE WORK FORCE* 70 (H. Bernardin ed. 1982) [hereinafter *Career Progress of Women*]; Ruble & Ruble, *supra* note 6; Spence, Deaux, & Helmreich, *Sex Roles in Contemporary American Society* in 2 *HANDBOOK OF SOCIAL PSYCHOLOGY* 149 (G. Lindzey & E. Aronson eds. 1985); SEX AND GENDER, *supra* note 7; Nieva & Gutek, *Sex Effects on Evaluation*, 5 *ACAD. OF MGMT. REV.* 267 (1980) [hereinafter *Sex Effects*]; Wallston & O'Leary, *Sex and Gender Make a Difference: The Differential Perceptions of Women & Men*, 2 *REV. OF PERSONALITY AND SOC. PSYCHOLOGY* 9 (1981).



quences of sex stereotypes, including in the employment setting.<sup>14</sup>

## II. STEREOTYPING UNDER CERTAIN CONDITIONS CAN CREATE DISCRIMINATORY CONSEQUENCES FOR STEREOTYPED GROUPS, INCLUDING WOMEN

### A. Stereotypes About Women Shape Perceptions About Women's Typical and Acceptable Roles in Society.

Stereotypes result from the normal cognitive process of categorization. Individuals form stereotypic beliefs about groups of people in much the same way they generalize about any aspect of their environment. "Stereotyping can be a work-saving, efficient cognitive enterprise, serving to simplify and organize the complex world we encounter." *Sex Bias in Work Settings*, *supra* note 11, at 271. "The leap from categorization to stereotyping . . . is a small one. Stereotypes, both benign and pernicious, evolve to describe categories of people." Taylor, *supra* note 11, at 84. Stereotypes, then, are "a set of attributes ascribed to a group and imputed to its individual members simply because they belong to that group." *Sex Bias in Work Settings*, *supra* note 11, at 271. Stereotypes "are not necessarily any more or less inaccurate, biased, or logically faulty than are any other kinds of cognitive generalizations," Taylor, *supra* note 11, at 84, and they need not inevitably lead to discriminatory conduct.

<sup>14</sup> This Court has acknowledged that sexual stereotypes exist and can affect employment decisions. See, e.g., *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978):

It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males and females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.

*Accord*, *Cty. of Washington v. Gunther*, 452 U.S. 161, 180 (1981) quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971): "In forbidding employers to discriminate against

"The problem is that stereotypes about groups of people often are *overgeneralizations* and are *either inaccurate or do not apply to the individual group member in question*." *Sex Bias in Work Settings*, *supra* note 11, at 271 (emphasis in original). That is because a categorization can lead to oversimplification and distortion, maximizing perceived differences between social groups and minimizing differences within them. Once an individual is classified as a member of a social group, perceptions of that group's average or reputed characteristics, and perceptions of behavior based on those characteristics, are readily relied on by those doing the classifying. It then becomes more difficult for the classifier to respond to the other person's own particular characteristics, making accurate, differentiated, and unique impressions less likely. In such instances, people tend to perceive members of the other group as all alike or to expect them to be all alike, which they never are.<sup>15</sup> For example, even when behavior is held constant in carefully controlled laboratory conditions, males are seen as more influential, more confident, and somewhat more deserving of respect than women, perceptions consonant with sex stereotypes. See *Categorical Bases*, *supra* note 15.

The category in which an individual is placed can have significant consequences because the stereotypic beliefs associated with the category create the foundation for

individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes . . . which have plagued women in the past."

<sup>15</sup> This process, "categorical responding," is a major component of stereotyping. See, e.g., Wilder, *Perceiving Persons as a Group: Categorization and Intergroup Relations in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR* 213 (D. Hamilton ed. 1981). The phenomenon is illustrated by such comments as "they all look alike to me" or "I remember a woman made a comment at the meeting, but I can't remember which one said it". See, e.g., Taylor, Fiske, Etcoff & Ruderman, *Categorical Bases of Person Memory and Stereotyping*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 778 (1978) [hereinafter *Categorical Bases*].



discriminatory behavior. Whether realized or not,<sup>16</sup> stereotypic beliefs create expectations about a person before that person is encountered and lead to distorted judgments about behavior. Therefore, "stereotypes become the basis for faulty reasoning leading to biased feelings and actions, disadvantaging (or advantaging) others not because of who they are or what they have done but because of what group they belong to." *Sex Bias in Work Settings*, *supra* note 11, at 271. As a result, people treat members of an ingroup preferentially, whether in assigning positive traits or in allocating rewards.<sup>17</sup> The choice by men to hire or promote comparable men over women is the most pertinent example.<sup>18</sup>

Sex, because of its salience and visibility, is a common basis for categorization and sex stereotypes are the prod-

<sup>16</sup> Uleman, *Consciousness and Control: The Case of Spontaneous Trait Inferences*, 13 PERSONALITY & SOC. PSYCHOLOGY BULL. 337 (1987).

<sup>17</sup> See, e.g., Allen & Wilder, *Categorization, Belief Similarity, and Intergroup Discrimination*, 32 J. PERSONALITY & SOC. PSYCHOLOGY 971 (1975); Tajfel & Billig, *Familiarity and Categorization in Intergroup Behavior*, 10 J. EXPER. SOC. PSYCHOLOGY 159 (1974).

<sup>18</sup> See, e.g., Heilman, *Information as a Deterrent Against Sex Discrimination: The Effects of Applicant Sex and Information Type on Preliminary Employment Decisions*, 33 ORGAN. BEHAV. & HUM. PERF. 174 (1984) [hereinafter *Information as Deterrent*]; Heilman & Stopeck, *Attractiveness and Corporate Success: Different Causal Attributions for Males and Females*, 70 J. APPLIED PSYCHOLOGY 329 (1985); Rosen & Jerdee, *Effects of Applicants' Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions*, 59 J. Applied Psychology 9 (1974); Rosen & Jerdee, *Perceived Sex Differences in Managerially Relevant Characteristics*, 4 SEX ROLES 837 (1978); "These studies [referring to work by Rosen & Jerdee] found that managers held rather consistent biases against women with respect to promotions to managerial positions, assignments to demanding jobs, and selection for supervisory training." Ruble, Cohen & Ruble, *Sex Stereotypes: Occupational Barriers for Women*, 27 AM. BEHAV. SCIENTIST 339, 348 (1984); see also references cited in Part II(B).

uct. Sex stereotypes have two features. First, they specify the attributes characteristic of each sex. Second, they dictate which behaviors are appropriate for men and women. Either can cause sex discrimination, the one based on faulty descriptive beliefs about what women are like and the other based on normative expectations about what women should be like. See Terborg, *Women in Management: A Research Review*. 62 J. APPLIED PSYCHOLOGY 647 (1977).

With regard to *descriptive beliefs*, studies of sex stereotypes have repeatedly demonstrated that men and women are viewed very differently by all kinds of people. In fact, men and women are viewed as polar opposites with respect to many personality attributes.<sup>19</sup> With regard to achievement oriented traits, men are thought to be competent, strong, independent, active, competitive, and self-confident and women are thought to be incompetent, weak, dependent, passive, uncompetitive, and unconfident.<sup>20</sup>

The traits stereotypically associated with women and men are not only different but they are seen as differentially desirable. Although each is credited with a number of positive traits, persons of both sexes concur that those traits perceived to be related to men are more valued than those related to women. See *Sex-role Stereotypes*,

<sup>19</sup> See Broverman, Vogel, Broverman, Clarkson & Rosenkrantz, *Sex-role Stereotypes: A Current Appraisal*, 27 J. SOC. ISSUES 59 (1972); Foushee, Helmreich & Spence, *Implicit Theories of Masculinity and Femininity: Dualistic or Bipolar?* 3 PSYCHOLOGY OF WOMEN Q. 259 (1979); Ruble & Ruble, *supra* note 6.

<sup>20</sup> Societal stereotypes about women are extremely tenacious and have held despite when the investigation occurred or the type of methodology employed. See *Sex Bias in Work Settings*, *supra* note 11, at 272. A recent study found no change in attitudes toward women executives; male MBAs held as negative attitudes toward such women in the 1980s as in the 1970s. Dubno, *Attitudes Toward Women Executives: A Longitudinal Approach*, 28 ACAD. OF MGMT. J. 235 (1985).

*supra* note 10. Achievement, a trait associated with men, seems to be more highly valued in our society than nurturance or affiliation, traits associated with women.

Despite the fact that these perceptions have been cherished and time-honored, many of the presumed differences between males and females are based in myth. There is no support for the view that women lack the motivation to achieve nor are they less intelligent than men. See E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* (1974). A considerable body of literature demonstrates women have similar vocational interests, leadership abilities, problem solving abilities, and potential managerial capacities as do men.<sup>21</sup> Thus, in many areas directly related to achievement, men and women are more alike than different. Yet, the view persists that there are crucial differences.

With regard to *normative beliefs*, the expectation that members of a different social category will be similar to each other can carry prescriptive or normative implications. Norms governing the approved masculine or feminine stereotypes image are clearly defined and widely agreed upon.<sup>22</sup> Norms specify behaviors that are thought to be not only characteristic of each sex, but also desirable and encouraged. For example, females who display "womanly" traits and males who display "manly" traits are more favorably evaluated and judged more psychologi-

<sup>21</sup> See Matthews, *Employment Implications of Psychological Characteristics of Men and Women in WOMEN IN THE WORK FORCE* 27 (M. Katzell & W. Byham eds. 1972); Bass, Krusell & Alexander, *Male Managers' Attitudes Toward Working Women*, 15 AM. SCIENTIST 221 (1971); Day & Stogdill, *Leader Behavior of Male and Females Supervisors: A Comparative Study*, 25 PERSONNEL PSYCHOLOGY 353 (1972).

<sup>22</sup> See, e.g., Lunnenborg, *Stereotypic Aspects in Masculinity-Femininity Measurement*, 34 J. CONSULTING & CLINICAL PSYCHOLOGY 776 (1970); McKee & Sherriffs, *Men's and Women's Beliefs, Ideals, and Self Concepts*, 65 AM. J. SOCIOLOGY 356 (1959); Steinmann & Fox, *Male-Female Perceptions of the Female Role in the United States*, 64 J. PSYCHOLOGY 265 (1966).

cally health than those who do not.<sup>23</sup> Conversely, those who engage in what is perceived to be cross-sex behavior can be the victim of social sanctions. A woman who speaks aggressively, strides across the room, and wears no-nonsense clothes is perceived to be insufficiently feminine. Such discrepant individuals are psychologically "fenced off" from the rest of the group into a subcategory, often one that is negatively evaluated. In the present case, Ms. Hopkins' supporters described her behavior as outspoken, independent, self-confident, assertive, and courageous. Her detractors interpreted the same behavior as overbearing, arrogant, self-centered and abrasive.<sup>24</sup> The former descriptions fit the image of a competent partner; the latter fit into the stereotype of the "women's libber," see 618 F. Supp. at 1117; 825 F.2d at 458, or the "Iron Maiden"—a frequent subcategory for career women who are perceived to be unfeminine.<sup>25</sup> These value judgments become a critical dimension along

<sup>23</sup> See, e.g., Costrich, Feinstein, Kidder, Marecek & Pascale, *When Stereotypes Hurt: Three Studies of Penalties for Sex-role Reversals*, 11 J. EXPER. & SOC. PSYCHOLOGY 520 (1975) [hereinafter *When Stereotypes Hurt*] and n.25, *infra*.

<sup>24</sup> Because categorization influences one's interpretation of an individual's action, the same behavior can be reinterpreted in light of one's stereotypes. See *Categorical Bases*, *supra* note 15.

<sup>25</sup> R. KANTER, *MEN AND WOMEN OF THE CORPORATION* 233-237 (1977) [hereinafter KANTER]; Brown & Geis, *Turning Lead into Gold: Evaluations of Men and Women Leaders and the Alchemy of Social Consensus*, 46 J. PERSONALITY & SOC. PSYCHOLOGY 811 (1984) [hereinafter *Evaluation of Men & Women Leaders*]; Deaux & Lewis, *The Structure of Gender Stereotypes: Interrelationships among Components and Gender Label*, 46 J. PERSONALITY & SOC. PSYCHOLOGY 991 (1984); Kristal, Sanders, Spence & Helmreich, *Inferences about the Femininity of Component Women and their Implications for Likeability*, 1 SEX ROLES 33 (1975); Prather, *Why Can't Women be More Like Men: A Summary of the Sociopsychological Factors Hindering Women's Advancement in the Professions*, 15 AM. BEHAV. SCIENTIST 172 (1971); *When Stereotypes Hurt*, *supra* note 23; Wiley & Eskilson, *Coping in the Corporation: Sex Role Constraints*, 12 J. APPLIED SOC. PSYCHOLOGY 1 (1982) [hereinafter *Coping in the Corporation*].



which others are evaluated. This is especially the case where the behavior is distinctly contrary to the stereotyped expectation, as when a woman uses profanity.<sup>26</sup>

In sum, descriptive stereotypes characterize women in a manner that undermines their competence and effectiveness; normative stereotypes cast as deviants those women whose behavior seems inappropriately masculine. Each has potentially detrimental and discriminatory consequences for women who are achievement-oriented.

#### B. Sex Stereotypes Have Demonstrably Negative Effects on Women in Work Settings.

A multitude of studies has shown that providing precisely the same information about job qualifications or job performance and merely varying the identity associated with the information as either male or female leads to differential and negative evaluations of the woman or her work.<sup>27</sup> This is true when women apply for jobs or seek promotions once on the job.

When an individual first seeks entry into an organization, because of the visibility of sex as an attribute,

<sup>26</sup> Fiske & Neuberg, *A Continuum of Impression Formation from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation* in 23 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* (M. Zanna ed. in press) [hereinafter Fiske & Neuberg]; Higgins & Bargh, *Social Cognition and Social Perception*, 38 *ANN. REV. PSYCHOLOGY* 369 (1987) [hereinafter Higgins & Bargh].

<sup>27</sup> See, e.g., Dipboye, Arvey & Terpstra, *Sex and Physical Attractiveness of Rates and Applicants as Determinants of Resume Evaluations*, 62 *J. APPLIED PSYCHOLOGY* 288 (1977); Dipboye, Fromkin & Wiback, *Relative Importance of Applicant Sex, Attractiveness, and Scholastic Standing in Evaluation of Job Applicant Resumes*, 60 *J. APPLIED PSYCHOLOGY* 39 (1975); Terborg & Ilgen, *A Theoretical Approach to Sex Discrimination in Traditionally Masculine Occupations*, 13 *ORG. BEHAV. & HUM. PERF.* 352 (1975); *When Stereotypes Hurt*, *supra* note 23; Zickmund, Hitt & Pickens, *Influence of Sex and Scholastic Performance on Reactions to Job Applicant Resumes*, 63 *J. APPLIED PSYCHOLOGY* 252 (1978).

sex stereotypes are apt to be a predominant element in decisionmaking. The attributes ascribed to women are not those believed essential for work success, e.g., achievement orientation, and, thus, "sex discrimination has been repeatedly demonstrated in employee selection processes," *Sex Bias in Work Settings*, *supra* note 11, at 280, most particularly when women apply for traditionally male positions.<sup>28</sup> Not only are males judged preferable to females and evaluated more favorably in selection deliberations, but they are likely to be offered higher starting salaries and higher level positions.<sup>29</sup> Such differential evaluations of applicants for managerial positions are greater, as in this case, when jobs are more demanding and challenging. See *Career Progress of Women*, *supra* note 13.

Once on the job, sex-stereotypic attributes bias the evaluation of women's work performance. Women's achievements are perceived in a way which fit with stereotypic ideas regardless of whether facts about an individual woman objectively support the perception. As a result, accomplishments by women are significantly more likely to be discounted than the same accomplishments by men because the successful performance of women is attributed to ephemeral or unstable causal factors. Performance of women in traditionally male jobs is very often devalued simply because they are women,<sup>30</sup> or because their highly accomplished performance is attributed to good luck or hard work, rather

<sup>28</sup> See Olian, Schwab & Haberfield, *The Impact of Applicant Gender Compared to Qualifications on Hiring Recommendations*, 40 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 180 (1988) and *Career Progress of Women*, *supra* note 13 for reviews.

<sup>29</sup> See Dipboye, Arvey & Terpstra, *supra* note 27; Terborg & Ilgen, *supra* note 27. These discriminatory behaviors are evident even among people who deny any prejudice toward women in management. See *Evaluation of Men and Women Leaders*, *supra* note 25, at 817.

<sup>30</sup> See *Sex Bias in Work Settings*, *supra* note 11; *Sex Effects*, *supra* note 13.



than sheer ability and competence.<sup>31</sup> That these evaluations are not based on competence results in judgments detrimentally affecting the degree to which organizational rewards are accorded women and impedes career progress.<sup>32</sup>

Even if descriptive stereotypes are not operative, it is likely that other stereotypic processes will lead to negative consequences. Most importantly, normative expectations can result in detrimental evaluations. Women pursuing traditionally masculine occupations are likely to be penalized for their violation of sex-related expectations no matter what their background or qualifications and they are often forced to cope with negative reactions to their "out-of-role" behaviors.<sup>33</sup> This might explain why petitioner refused to make Ms. Hopkins a partner despite the fact that she brought in \$40 million worth of business.

<sup>31</sup> See Deaux & Emswiller, *Explanation of Successful Performance on Sex-Linked Tasks: What is Skill for the Male is Luck for the Female*, 29 J. PERS. & SOC. PSYCHOLOGY 80 (1974); Taynor & Deaux, *Equity and Perceived Sex Differences: Role Behavior as Defined by the Task, the Mode, and the Action*, 32 J. PERS. & SOC. PSYCHOLOGY 381 (1975). Individuals who hold negative attitudes toward the presence of women in managerial positions are particularly likely to show such biases. Garland & Price, *Attitudes Toward Women in Management and Attributions for their Success and Failure in a Managerial Position*, 59 J. APPLIED PSYCHOLOGY 705 (1977).

<sup>32</sup> Heilman & Guzzo, *The Perceived Cause of Work Success as a Mediator of Sex Discrimination in Organizations*, 21 ORIG. BEHAV. & HUM. PERF. 346 (1978).

<sup>33</sup> For example, both women and men are evaluated more favorably when their leadership activities consist of sex appropriate behaviors, that is, when a female manager is interpersonally oriented and a male manager is task oriented. See Bartol & Butterfield, *Sex Effects in Evaluating Leaders*, 61 J. APPLIED PSYCHOLOGY 446 (1976); *Coping in the Corporation*, supra note 25; Jago & Vroom, *Sex Differences in the Incidents & Evaluations of Participative Leader Behavior*, 67 J. APPLIED PSYCHOLOGY 776 (1982); Rosen & Jerdee, *The Influence of Sex-Role Stereotypes on Evaluations of Male and Female Supervisory Behavior*, 57 J. APPLIED PSYCHOLOGY 44 (1973).

Reactions to women's out-of-role behavior studied in a series of laboratory studies uniformly showed that women who violate norms of feminine passive-dependency are penalized. They were rated as less popular and as more poorly adjusted than women who abided by the behaviors believed appropriate to their sex.<sup>34</sup> In the classic study of men and women in a large corporation, women were often considered in two distinct categories—women and managers. As women, they were measured by how well they filled the management roles; as managers they were expected to conform to men's images of womanhood. KANTER, *supra* note 25. These two categorizations are perceived as incompatible.<sup>35</sup> Paradoxically, as with Ms. Hopkins, women in non-traditional fields are evaluated negatively if they do their jobs well.

In sum, sex stereotypes place women into a "double-bind" situation. If they are viewed "as women" they are frequently denied access to high power positions because their presumed attributes cause them to appear incapable or their performance is ascribed to something other than competence. This is particularly the case if coworkers convey, even in subtle ways, their lack of support for a female leader.<sup>36</sup> If, however, they are perceived as advancement.

<sup>34</sup> *When Stereotypes Hurt*, supra note 23. Women who perform competently at traditionally male tasks are disliked and ostracized. See Hagen & Kahn, *Discrimination Against Competent Women*, 5 J. APPLIED SOC. PSYCHOLOGY 362 (1975).

<sup>35</sup> Schein, *Relationships Between Sex-Role Stereotypes and Requisite Management Characteristics Among Female Managers*, 60 J. APPLIED PSYCHOLOGY 340 (1975); Schein, *The Relationship Between Sex-Role Stereotypes and Requisite Management Characteristics*, 57 J. APPLIED PSYCHOLOGY 95 (1973).

<sup>36</sup> See *Evaluation of Men & Women Leaders*, supra note 25. This might explain why those supporters of Ms. Hopkins, who originally filled in their evaluations individually and in private, then withdrew their support after they found out the negative evaluations of her detractors. Thus, her inconstant supporters were subject to the same kind of stereotypic dynamics as her detractors.

gaging in "masculine" behaviors deemed essential for the job, they are considered to be abrasive, or maladjusted. In many cases, then, the achievement oriented woman is caught—whatever her behavior, it bodes ill for her career

### III. THE CONDITIONS THAT PROMOTE STEREOTYPING WERE PRESENT IN PETITIONER'S WORK SETTING

At least three significant factors promote stereotyping in social contexts, including employment settings: (1) The rarity of the stereotyped individual within the evaluation setting; (2) the ambiguity of criteria used to make an evaluation; and (3) the paucity of information available to evaluators. All those factors were present in this case.

1. *Rarity of the Individual.* When there are very few employees who are members of a particular group, those employees are considerably more likely to be stereotyped than if the group of which they are a part is represented in large numbers. Singular or rare individuals attract more attention, are evaluated more extremely, are more likely to be perceived as enacting stereotyped roles, and are believed to have a greater, sometimes more disruptive, impact on the group.

A member of a group comprising 15% or less of the total work force is considered to be in a setting in which members of the minority have solo status or its psychological equivalent.<sup>37</sup> Petitioner's setting meets this criterion. Ms. Hopkins was the one female in a class of 88 partner candidates in a firm of 662 partners, only seven of whom were women.<sup>38</sup> In such cases, discriminatory outcomes

<sup>37</sup> See KANTER, *supra* note 25, at 206-242. The particular immediate setting matters especially. If 35% of the company's work force is females, all but one being secretaries, the one female manager will have solo status. *Id.*

<sup>38</sup> Nothing significant appears to have changed at Price Waterhouse. As of July 1, 1988, petitioner will have 24 women partners out of a total of 898. See Brief for Petitioner at n.1.

are demonstrably more likely. One study has shown that evaluations of women applicants for a managerial position are significantly less favorable when the applicant pool contains 25% or fewer females. Heilman, *The Impact of Situational Factors on Personnel Decisions Concerning Women: Varying the Sex Composition of the Applicant Pool*, 26 ORIG. BEHAV. AND HUM. PERF. 174 (1984). These evaluations are likely to be even more harshly negative if the person is perceived to come from a negative social category, *e.g.*, pushy career woman.

The only woman in an otherwise all-male setting attracts attention simply by being different and more noticeable.<sup>39</sup> Being unusual exaggerates other people's perceptions, especially when related to a stereotyped category like sex.<sup>40</sup> This is particularly true, as here, where the person evaluated is highly visible and unusually productive.

Evaluations of members of a different group, compared to evaluations of members of one's own group, are likely to be exaggerated and extreme.<sup>41</sup> Accordingly, if one is a male partner and has limited experience with

<sup>39</sup> Kanter, *supra* note 25, at 206-242; Crocker & McGraw, *What's Good for the Goose is not Good for the Gander: Solo Status as an Obstacle to Occupational Achievement for Males and Females*, 27 AM. BEHAV. SCIENTIST 357 (1982); Wolman & Frank, *The Solo Woman in a Professional Peer Group*, 45 AM. J. ORTHOPSYCHIATRY 164 (1975).

<sup>40</sup> See McArthur, *What Grabs You? The Role of Attention in Impression Formation and Causal Attribution in 1 SOCIAL COGNITION: THE ONTARIO SYMPOSIUM* 201 (T. Higgins, C. Herman & M. Zanna eds. 1981); Taylor & Fiske, *Salience, Attention and Attribution: Top of the Head Phenomena*, 11 ADV. EXPERIMENTAL & SOC. PSYCHOLOGY 249 (1978).

<sup>41</sup> See, *e.g.*, Allen & Wilder, *Categorization, Belief Similarity, and Intergroup Discrimination*, 32 J. PERSONALITY & SOC. PSYCHOLOGY 971 (1975); Linville & Jones, *Polarized Appraisals of Outgroup Members*, 38 J. PERSONALITY & SOC. PSYCHOLOGY 689 (1980).



female managers, one is likely to evaluate any given female manager in a more extreme way. Impressions are even more likely to be polarized when the person evaluated has solo or rare status.<sup>42</sup>

Another effect of rarity is that individuals such as Ms. Hopkins are likely to be seen as enacting stereotypic roles. The increased attention to such persons causes observers to form more "packaged" stereotypic impressions than they otherwise would.<sup>43</sup> This phenomenon, called "role encapsulation," see KANTER, *supra* note 25, at 230, leads the majority to isolate the minority from the otherwise homogeneous majority culture.

Lastly, the solo or rare individual is perceived as having greater impact on the group than do members of the majority. They are perceived as determining the nature of interactions in which they participate and as a disruptive force. This is true even when the actual behavior of the rare individual is no different from the rest of the group.<sup>44</sup>

2. *Ambiguity of Evaluative Criteria.* The second factor that contributes to the potential for stereotyping is the subjectivity or ambiguity of the criteria used for evaluation. As in this case, interpersonal skills would be more vulnerable to stereotypic judgments than would garnering a certain amount of business income because of the greater ambiguity of the former. This is not to say that subjective criteria violate Title VII and should not be used in personnel judgments.<sup>45</sup> Rather, the point

<sup>42</sup> See FISKE & TAYLOR, *SOCIAL COGNITION* 184-190 (1984); Taylor, *supra* note 11, at 89-97.

<sup>43</sup> See KANTER, *supra* note 25, at 211, 230-237; Taylor, *supra* note 11, at 89; *Categorical Bases*, *supra* note 15.

<sup>44</sup> McArthur, *supra* note 40; Taylor & Fiske, *supra* note 40.

<sup>45</sup> Well-developed performance criteria using subjective evaluation devices are not necessarily influenced by stereotypic attitudes or behavior. Performance appraisal systems, based on a thorough

is that ambiguous criteria are easier to distort on the basis of stereotypes. This principle has been specifically demonstrated with sex stereotyping. One review of 58 studies of sex biases in performance evaluations concluded that "the greater the amount of inference required in the evaluation situation, the more likely it is that evaluation bias will be found." *Sex Effects*, *supra* note 13, at 170. They found evaluations of qualifications for hiring and promotion as particularly bias-prone.

3. *Paucity of Information.* Stereotyping is most likely when decisionmakers have available a paucity of information. Paucity can be defined as (1) information that is relatively limited beyond some convenient category like sex; (2) ambiguous information that could be interpreted in multiple ways; and (3) information about the individual that is irrelevant to the judgment the evaluator must make.

Not surprisingly, research corroborates the common-sense notion that people are more likely to stereotype another person when they have little information about the other. This is particularly true when the scant information seems to fit the stereotypic category.<sup>46</sup>

analysis of job requirements can be reliable, job-related, and fair. See Brief for *Amicus curiae* American Psychological Association, *Watson v. Fort Worth Bank & Trust*, No. 86-6139. In addition, instructing raters that skills and outcomes rather than personality or mannerisms are the proper basis for performance appraisal as well as organizational policies that unambiguously communicate the inappropriateness of stereotypic bias can result in unbiased evaluations. Petitioner failed to take these steps. See Part IV, *infra*.

<sup>46</sup> Locksley, Borgida, Brekke & Hepburn, *Sex Stereotypes and Social Judgment*, 39 J. PERSONALITY & SOC. PSYCHOLOGY 821 (1980); Locksley, Hepburn & Ortiz, *Social Stereotypes and Judgments of Individuals: An Instance of the Base Rate Fallacy*, 18 J. EXPER. SOC. PSYCHOLOGY 23 (1982); Rasinski, Crocker & Hastie, *Another Look at Sex Stereotypes and Social Judgments: An Analysis of the Social Perceiver's Use of Subjective Probabilities*, 49



One primary form of ambiguity is mixed behavior, *i.e.*, some consistent and some inconsistent with the evaluator's stereotype. For example, when an evaluator categorizes a female professional as an "Iron Maiden" and she behaves in ways that could be interpreted as supporting the stereotype, *e.g.*, she is tough and assertive, as well as in ways that do not, *e.g.*, she is warm and funny, the evaluator tends to make stereotypic judgments, even though the information available is balanced.<sup>47</sup>

Lastly, stereotyping is more likely when the evaluator appears to have sufficient information but the information provided is, in fact, irrelevant to the particular judgment the evaluator is asked to make. For example, that a female professional wears dark suits and little makeup is irrelevant to her ability to function as a partner. But, such facts provide the illusion of having gathered enough information to make an informed decision and, despite the logical irrelevance of such information, the irrelevantities seem to reinforce the stereotype. A variety of studies have examined responses to men and women described by additional information that was unrelated both to sex stereotypes and the relevant judgment, *e.g.*, a score on a test of low validity with regard to suitability for a job. Stereotypic responses were made in each case and the irrelevant information was unable to undercut the category-based stereotype.<sup>48</sup> This phenomenon occurs,

J. PERSONALITY & SOC. PSYCHOLOGY 317 (1985). See 618 F. Supp. at 1118: "The Policy Board gave great weight to the negative views of individuals who had very little contact with the plaintiff."

<sup>47</sup> See, *e.g.*, Darley & Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 AM. PSYCHOLOGIST 867 (1980); Deaux & Major, *Putting Gender into Context: An Interactive Model of Gender-Related Behavior*, 94 PSYCHOLOGICAL REVIEW 369 (1987).

<sup>48</sup> See, *e.g.*, Dipboye, Fromkin & Wiback, *supra* note 27; Heneman, *Impact of Test Information and Applicant Sex on Applicant Evaluations in a Selection Simulation*, 62 J. APPLIED PSYCHOLOGY

as here, most frequently in cases where such strong category labels as sex are involved.<sup>49</sup>

#### IV. ALTHOUGH PETITIONER WAS FOUND TO HAVE TAKEN NO EFFECTIVE STEPS TO PREVENT ITS DISCRIMINATORY STEREOTYPING OF RESPONDENT, METHODS ARE AVAILABLE TO MONITOR AND REDUCE THE EFFECTS OF STEREOTYPING

The district court found, and the court of appeals affirmed, that petitioner:

never took any steps in its partnership policy statement or in the evaluation forms submitted to partners to articulate a policy against discrimination or to discourage sexual bias. The Admissions Committee never attempted to investigate whether any of the negative comments concerning the plaintiff were based on a discriminatory double standard.

618 F. Supp. at 1118-1119. Because stereotypic categorization is a basic feature of human thinking, *amicus* does not suggest that stereotypic beliefs can be eliminated. However, people can be taught to recognize categorization, influenced to resist evaluating individuals in categorical terms, and taught to break the link between categorization processes and judgmental consequences, thus reducing the likelihood that stereotypic thinking will be transformed into discriminatory action.

Three conditions contribute to the reduction of stereotypic thought and discriminatory action: (1) Additional information; (2) increased attention to that information and; (3) motivational incentives that support increased attention and indicate consensual disapproval of stereotyping. None of these conditions, by itself, is suffi-

524 (1977); Locksley, Borgida, Brekke & Hepburn, *supra* note 46; Pheterson, Kiesler & Goldberg, *supra* note 10; Rasinski, Crocker & Hastie, *supra* note 46.

<sup>49</sup> See, *e.g.*, Fiske & Neuberg, *supra* note 26; Higgins & Bargh, *supra* note 26.

cient but must be present in concert.<sup>50</sup> Nevertheless, petitioner failed to employ any of these conditions.

Information about a particular person can undermine the use of stereotypes, particularly if that information is inconsistent with the category (like sex) otherwise being used on which to base a judgment.<sup>51</sup> "By and large, the situations in which differential treatment on the basis of sex does not occur are the ones in which information clearly relevant to and crisply diagnostic of the target decision has been provided to the decision maker." *Information as Deterrent*, *supra* note 18, at 185.<sup>52</sup> Thus, stereotypes are less likely to affect evaluative judgments and predictions when employers provide specific behavioral information about employees.<sup>53</sup>

<sup>50</sup> For example, simply providing additional information can lead to the creation of subcategories of the stereotype, e.g., the "Iron Maiden." See text at nn. 22-26.

<sup>51</sup> See Deaux & Lewis, *supra* note 25; *Information as Deterrent*, *supra* note 18; Locksley, Borgida, Brekke & Hepburn, *supra* note 46; Locksley, Hepburn & Ortiz, *supra* note 46; Pheterson, Kiesler & Goldberg, *supra* note 10; Rasinski, Crocker & Hastie, *supra* note 46. For a review see Fiske & Neuberg, *supra* note 26.

<sup>52</sup> Not coincidentally, the evaluation settings in which differential treatment has been discovered are ones in which either little more than sex category information is made salient, see, e.g., *Effects of Applicants' Sex*, *supra* note 18, the additional information provided is not definitive but is ambiguous in its implications, see, e.g., Heneman, *Impact of Test Information and Applicant Sex on Applicant Evaluations in a Selection Simulation*, 62 J. APPLIED PSYCHOLOGY 524 (1977), or the additional information provided is weakly, if at all, related to the target decision. See, e.g., Dipboye, Fromkin & Wiback, *supra* note 27.

<sup>53</sup> Borgida, Locksley & Brekke, *Social Stereotypes and Social Judgment in PERSONALITY, COGNITION, AND SOCIAL INTERACTION* 153 (N. Cantor & J. Kihlstrom eds. 1981); Locksley, Borgida, Brekke & Hepburn, *supra* note 46. Many behavioral evaluation systems are readily available. See, e.g., B. SCHNEIDER & N. SCHMITT, *STAFFING ORGANIZATIONS* (2d ed. 1986).

Because information is rarely sufficient to prevent stereotyping, particularly if the category in question, like sex, is widely used and readily accessible, employers should attempt to ensure that evaluators pay attention both to the forming of erroneous impressions and to the particularized information that will temper the tendency to stereotype. Both sufficient time and concentrated attention are necessary to undercut stereotyping if information inconsistent with the stereotype is to have an impact on the evaluator.<sup>54</sup>

As important, employers must motivate evaluators to avoid stereotypical judgments. If individuals are motivated to be accurate in their decisions and to base those decisions on individual characteristics, they will be less likely to use stereotypic categories.<sup>55</sup> At least three types of organizational incentives encourage people to avoid stereotyping.

First, interdependence undercuts stereotyping and encourages more accurate, particularized impressions.<sup>56</sup> Thus, an organization that makes teamwork explicit, makes promotions depend on group products, and em-

<sup>54</sup> See Burnstein & Schul, *The Information Basis of Social Judgments: Operations in Forming Impressions of Other Persons*, 18 J. EXPER. SOC. PSYCHOLOGY 217 (1982); Jamieson & Zanna, *Need for Structure in Attitude Formation and Expression in ATTITUDE STRUCTURE AND FUNCTION* (A. Pratkanis, S. Breckler & A. Greenwald eds. in press). For a review see Fiske & Neuberg, *supra* note 26.

<sup>55</sup> See Fiske & Neuberg, *supra* note 26; Higgins & Bargh, *supra* note 26; Kruglanski, *Motivations for Judging and Knowing: Implications for Causal Attribution* in 2 HANDBOOK OF MOTIVATION AND COGNITION (E. Higgins & R. Sorrentino eds. in press).

<sup>56</sup> See M. SHERIF & C. SHERIF, *GROUPS IN HARMONY AND TENSION* (1953); Deutch, *An Experimental Study of the Effects of Cooperation and Competition upon Group Process*, 2 HUM. RELATIONS 199 (1949); Neuberg & Fiske, *Motivational Influences on Attention, and Individuating Processes*, 53 J. PERSONALITY & SOC. PSYCHOLOGY 431 (1987).



phasizes supervisors' responsibilities for their subordinates' success can reduce stereotyping.

Second, if decisionmakers are reminded that the subordinate's future depends on their judgments and if the employer emphasizes accuracy, then decisionmakers make less stereotyped, more particularized evaluations.<sup>57</sup> Such considerations as decision accuracy must be salient to the decisionmaker in the immediate context of the evaluation, not just, as here, in a little known policy statement.

Finally, the opinion of a third party to the evaluation process, particularly that of a superior or colleague, can exert a major influence on the decisional process and the decision itself. For example, in evaluating a leader's performance, group members rated a female leader as more effective when her position had been specifically legitimized by superiors. See *Evaluations of Men & Women Leaders*, *supra* note 25. Similarly, if people are held accountable and anticipate that they will have to justify their assessments, they show greater accuracy and exhibit fewer overconfident generalizations.<sup>58</sup> These salutary outcomes will occur, however, only when the third parties are known to discourage stereotypical thinking. In contrast, an evaluator may choose to endorse stereotypic charact-

<sup>57</sup> See, e.g., Freund, Kruglanski & Schpitizajzen, *The Freezing and Unfreezing of Impression Primacy: Effects of the Need for Structure and the Fear of Invalidity*, 11 PERSONALITY & SOC. PSYCHOLOGY BULL. 479 (1985); Neuberg & Fiske, *supra* note 56; Touhey, *Role Perception and the Relative Influence of the Perceiver and the Perceived*, 87 J. SOC. PSYCHOLOGY 213 (1972).

<sup>58</sup> See Mayseless & Kruglanski, *What Makes You So Sure? Effects of Epistemic Motivations on Judgmental Confidence*, 39 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 162 (1987); Tetlock, *Accountability and Complexity of Thought*, 45 J. PERSONALITY & SOC. PSYCHOLOGY 74 (1983); Tetlock, *Accountability and the Perseverance of First Impressions*, 46 SOC. PSYCHOLOGY Q. 285 (1983); Tetlock & Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 J. PERSONALITY & SOC. PSYCHOLOGY 700 (1987).

erizations if those judgments are believed, as in petitioner's case, to be compatible with those of peers or superiors.

In sum, although stereotyping is pervasive, it is not inevitable. Natural tendencies to evaluate women negatively on the basis of their categorical membership can be overcome by systematic organizational interventions.

## CONCLUSION

There is substantial and convergent social science evidence that stereotyping of women, particularly in the evaluation of those who seek high status in the workplace, exists and negatively affects their chances for selection and promotion. The methods used by Dr. Fiske, respondent's expert, to analyze the evidence of adverse stereotypic judgments made by petitioner's partners are standard in the field. Researchers regularly examine natural and simulated settings to determine the extent to which those settings manifest the antecedent conditions and behavioral indicators that result in stereotypic judgments. In such an examination it is customary to scrutinize the verbal record of decisionmakers' comments, descriptions, ratings, and behavior regarding the individual evaluated. This is precisely what Dr. Fiske did. See Tr. 615.

Current research and theory supports Dr. Fiske's conclusions that the conditions that promote, and the indicators that evidence, stereotyping appear to have been present at Price Waterhouse, which failed to monitor and take appropriate action to diminish stereotyping. In light of that research, the record supports the conclusion that the adverse consequences suffered by respondent were the natural and foreseeable outcome of the petitioner's conduct.

For all the foregoing reasons, *amicus* respectfully requests this Court to affirm the decision of the Court of Appeals for the District of Columbia Circuit insofar as that decision relies on a finding of stereotypic thinking



on the part of petitioner, its translation into discriminatory action, and petitioner's failure to provide a setting in which the discriminatory consequences of stereotyping would be substantially reduced.

Respectfully submitted,

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June 18, 1988

FILED

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

PRICE WATERHOUSE,

*Petitioner,*

—v.—

ANN B. HOPKINS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF AMICI CURIAE NOW LEGAL DEFENSE AND EDUCATION  
FUND, AMERICAN CIVIL LIBERTIES UNION, WOMEN'S LEGAL DEFENSE  
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INTEREST OF AMICI CURIAE<sup>1</sup>

Amici curiae are non-profit women's legal, education and research organizations, women's political and membership organizations, women's bar associations, women's professional organizations and other public interest groups and individuals concerned about women's legal rights and women's economic status and well-being. The interest of each individual amicus curiae is set forth in the Appendix to this brief.

Amici believe that the opinion below sets important precedent for the enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and that

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<sup>1</sup> The parties have consented to the filing of this brief, and the letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

this Court should affirm that decision to give important and needed guidance to the Circuits.

#### SUMMARY OF ARGUMENT

As United States Ambassador to the United Nations Jeane Kirkpatrick, reflecting upon others' perceptions of her as a woman in a high government office, has said, "I've come to see here a double-bind: if a woman seems strong, she is called 'tough,' and if she doesn't seem strong, she's found not strong enough to occupy a high level job in a crunch." These evaluations, she noted, "express a certain ... general surprise and disapproval at the presence of a woman in arenas in which it is necessary to be - what for males would be considered - normally assertive." Ambassador Kirkpatrick's observations summarize the experience of many women who

have entered male-dominated occupations and have sought advancement. Her observations are borne out also by the conclusions reported in a vast body of scientific research on sex-based stereotyping, particularly in organizational behavior.<sup>2</sup>

The problem encapsulated by Ambassador Kirkpatrick in her speech is at the core of this case; strong, talented women like Ann Hopkins, seeking promotion in traditionally male realms of corporate and political power, all too often face evaluation by colleagues and superiors who perceive them as women first, as employees second. If

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<sup>2</sup> The brief of Amicus Curiae American Psychological Association in Support of Respondent addresses the breadth, depth and general scientific acceptability of this research upon which the expert testimony in this case is based. See also Taub, Keeping Women in Their Place: Stereotyping Per Se As A Form of Employment Discrimination, 21 B. C. L. Rev. 345 (1980) (discussing relevance of sex stereotyping research to Title VII law).



care is not taken to avoid stereotyping women in the process, women are impermissibly and illegally assessed using completely different standards and sexist norms.

In this case the record is replete with evidence that the decision-making process applied by Price Waterhouse to Ann Hopkins' bid for partnership was pervaded by easily identifiable sex stereotyping, to her detriment. There is no indication that Price Waterhouse, a virtually all-male domain, took any steps to stop the obvious sexism in the evaluation process. Such evidence is direct evidence of discriminatory motive, that sex-based discrimination occurred, entitling the plaintiff to at least declaratory and injunctive relief. No more need be shown for the burden to shift to the defendant so that the defendant may attempt to show that

other types of requested relief are inappropriate. At this stage the defendant, as a proven wrongdoer, should bear the burden of proving, if indeed it can, by clear and convincing evidence that make whole relief is inappropriate.

#### INTRODUCTION

This case typifies the "second generation" of employment discrimination cases. Although women are entering business and the professions, they are prevented from achieving the highest levels in those professions because of gender-based biases.

In this case, Ann Hopkins was denied advancement to partnership status at Price Waterhouse even though she was personally responsible for bringing to the firm more new clients than anyone else in her candidate class and generating an estimated \$34 to \$44 million dollars in business.

She was highly recommended by her clients. Her remarkable business achievements, which were alone sufficient to qualify her to join the ranks of the more than 650 partners, were virtually ignored, and instead the firm's all-male partnership committee focused almost exclusively on her personality, and in particular, on her "unladylike" characteristics: her hard-driving, aggressive, and "unfeminine" behavior. Behavior that would have been expected, acceptable and perhaps even required of a man in a leadership position became a liability for this woman who was told she needed "a course in charm school" to qualify for partnership.

That Ann Hopkins' sex was a critical factor in the failure of her partnership bid at Price Waterhouse is indisputable. She was evaluated in terms of sex-based stereotypes which prescribe specific forms

of behavior and appearance for women.<sup>3</sup> These stereotypes are similar to other impermissible sex-based assumptions and generalizations, e.g., that women are not good at math, that they do not like or want factory work, or that they are or should be more nurturing than men. In the employment context, an employer's reliance on sex-based assumptions about appropriate behavior or other characteristics constitutes direct evidence of intentional discrimination. Here the requirement that women conform to an idealized model of femininity was patently not job-related,

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<sup>3</sup> These stereotypes rest on assumptions or generalizations that women should conform to certain "female" personality characteristics, but many women do not conform to "even a true generalization." City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 708 (1978). Stereotypes apply to expected behavior as well as other traits.

since by virtually any measure, Hopkins' job performance was stellar.

Moreover, as this case demonstrates, generalizations about how women should look and act create a profound dilemma for women aspiring to high-level positions. Those who fail to conform, like Ann Hopkins, are criticized because they are not sufficiently "ladylike"; those who do conform to a female stereotype are deemed inadequate in job-related skills, because they are said not to be qualified to do a "man's" job.<sup>4</sup> Women seeking high-powered professional leadership positions thus walk

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<sup>4</sup> See generally The Trapped Woman: Catch-22 in Deviance and Control 206-08 (J. Figueira-McDonough & R. Sarri eds. 1987); C. Tavis & C. Wade, The Longest War: Sex Differences in Perspective 265 (2d ed. 1984); E. Schur, Labeling Women Deviant: Gender, Stigma, and Social Control (1983); V. Nieva & B. Gutek, Women & Work 59 (1982); Heilman, Sex Bias in Work Settings: The Lack of Fit Model in 5 Research in Organizational Behavior 269 (B. Staw & L. Cummings eds. 1983);

a tightrope, so long as sex-stereotyped personality characteristics control access to such jobs. The significance of this phenomenon has been widely noted, as women have moved into lower level professional jobs in significant numbers, but have failed to progress to the upper echelon, in substantial part because of these invisible barriers.<sup>5</sup>

Ambassador Jeane Kirkpatrick, United States Permanent Representative to the United Nations, described the problem in another way:

[I]f I make a speech, particularly a substantial speech, it has been frequently described in the media as "lecturing my colleagues," as though it were somehow peculiarly inappropriate,

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<sup>5</sup> As one study noted, the most insurmountable barrier is the way women are perceived by their male colleagues and evaluators. A. Morrison, R. White & E. Van Velsor, Breaking the Glass Ceiling: Can Women Reach the Top of America's Largest Corporations? (1987).



like an ill-tempered schoolmarm might scold her children. When I have replied to criticisms of the United States (which is an important part of my job), I have frequently been described as "confrontational".... It was a while before I noticed that none of my male colleagues, who often delivered more "confrontational" speeches than I, were labeled as "confrontational"....

I've come to see here a double-bind: if a woman seems strong, she is called "tough," and if she doesn't seem strong, she's found not strong enough to occupy a high level job in a crunch. Terms like "tough" and "confrontational" express a certain very general surprise and disapproval at the presence of a woman in arenas in which it is necessary to be - what for males would be considered - normally assertive. Stereotyping has endless variations.

5 News for Women in Psychiatry 14, 14-15  
(Oct. 1986) (reprinting speech of  
Ambassador Kirkpatrick to the Women's  
Forum, New York City, December 19, 1984)  
(emphasis in original).

Ambassador Kirkpatrick's experiences are similar to Ann Hopkins', in that for both the perceptions and evaluations of their conduct were fundamentally altered because of their sex. In Hopkins's case, the result was the denial of partnership.

At trial, Hopkins showed that the decision not to promote her, the sole woman, best client recruiter and highest money earner in a class of 88 candidates, resulted from an unfavorable evaluation directly related to the fact of her sex. The process by which this flawed evaluation was made is well-recognized and described by a large body of scientific research which explains why women encounter substantial difficulties achieving prominence in non-traditional professional jobs. Indeed, in this case, an expert cognitive psychologist, Dr. Susan Tufts Fiske, testified that such sex stereotyping

pervaded Price Waterhouse's decision-making.

This scientific research exposes the mechanisms by which invidious sexual, racial and other stereotypes operate in evaluation processes. Thus, in his classic volume, The Nature of Prejudice, Gordon Allport observed that "people use a 'least effort' principle of organization and group apparently similar people into categories...."<sup>6</sup> At the simplest level the research observes that perceivers use discriminating cues, especially physical traits such as sex and race, as ways of categorizing people and organizing

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<sup>6</sup> Taylor, A Categorization Approach to Stereotyping, in Cognitive Processes in Stereotyping and Intergroup Behavior 83, 83 (D.L. Hamilton ed. 1980) (citing G. Allport, The Nature of Prejudice (1954), and Pettigrew, The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice, 5 Pers. & Soc. Psych. Bull. 461 (1979)).

information about them. As a result, because "similarity" is the organizing principle, within-group differences become minimized, and between-group differences become exaggerated. For example, women are seen as more similar to each other and more different from men.<sup>7</sup>

Once people are categorized into such groups, the potential for discrimination arises. Research on ingroup/outgroup effects "consistently demonstrates" when subjects are asked to evaluate their own group and the other group and allocate rewards between the groups, "out group

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<sup>7</sup> See S. Fiske & S. Taylor, Social Cognition 160-61 (1984); Taylor, supra n. 6, at 84-85. The within/between effect in cognitive process is documented in, among other sources, Tajfel, Sheikh & Gardner, Content of Stereotypes and the Inference of Similarity Between Members of Stereotyped Groups, 22 Acta Psychologica 191 (1964); Campbell, Enhancement of Contrast as a Composite Habit, 53 J. Abn. & Soc. Psych. 350 (1956).

members are evaluated less favorably and given fewer rewards than in group members...even when the subject or subject's group do not benefit from depriving or unfavorably evaluating the out group."<sup>8</sup>

An example of this phenomenon has been documented in "resume studies", in which evaluators were given resumes of job "applicants" that were identical in every respect except the sex of the individual named on the resume; female resumes were

consistently rated lower than the sex-neutral or male resumes.<sup>9</sup>

In other words, even where all things are equal, evaluators tend to discount the accomplishments of women precisely because the accomplishments are those of women. The stable expectation, in the workplace, is that men succeed because of skill and fail because of bad luck or lack of effort and that women succeed because of luck or effort and fail because of lack of

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<sup>8</sup> Taylor, supra n.6, at 84 (citing Hamilton & Gifford, Illusory Correlation in Interpersonal Perception: A Cognitive Basis of Stereotypic Judgments, 12 J. Exp. Soc. Psychology 392 (1976); Wilder, Categorization, Belief Similarity and Intergroup Discrimination, 32 J. Per. & Soc. Psych. 971 (1975); Tajfel & Billig, Familiarity and Categorization in Intergroup Behavior, 10 J. Exp. Soc. Psych. 159 (1974); Billig & Tajfel, Social Categorization and Similarity in Intergroup Behavior, 3 European J. Soc. Psych. 27 (1973); Tajfel, Billig, Bundy & Flament, Social Categorization and Intergroup Behavior, 1 European J. Soc. Psych. 149 (1971)).

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<sup>9</sup> See generally Hitt & Zikmund, Forewarned is Forearmed: Potential Between and Within Sex Discrimination, 12 Sex Roles 807 (1985); Rosen, Career Progress of Women: Getting In and Staying In, in Women in the Workforce 70 (H. Bernardin ed. 1982); Heilman, supra n.4, at 281-82; Rosen & Jerdee, Influence of Sex Role Stereotypes on Personnel Decisions, 59 J. App. Psych. 9 (1974). The resume studies have been replicated under field and laboratory conditions with subjects of all ages and levels of accomplishment.



ability.<sup>10</sup> That is, men are credited for success and women are blamed for failure; men are assumed to be capable and women must prove themselves repeatedly.<sup>11</sup>

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<sup>10</sup> See K. Deaux, The Behavior of Women and Men (1976); Hansen & O'Leary, Actresses and Actors: The Effect of Sex on Causal Attributions, 4 Basic and Applied Soc. Psych. 209 (1984); Deaux, Sex: A Perspective on the Attribution Process, in New Directions in Attribution Research (J. Harvey, W. Ickes & K. Kidell eds. 1976).

<sup>11</sup> The tendency to stereotype is increased where the target of the stereotyping is a token, i.e. comprises fifteen to twenty-five percent or less of the relevant group, and evaluations are more extreme in such circumstances. See R. Kanter, Men and Women of the Corporation 206-42 (1977); Crocker & McGraw, What's Good for the Goose is Not Good for the Gander, 27 Am. Behav. Scientist 357 (1984); Heilman, The Impact of Situational Factors on Personnel Decisions Concerning Women: Varying the Sex Composition of the Applicant Pool, 26 Org. Behav. and Hum. Perf. 386 (1980); Taylor, supra n.6, at 89-98; Spangler, Gordon & Pipken, Token Women: An Empirical Test of the Kanter Hypothesis, 84 Am. J. Soc. 160 (1978); Wolman & Frank, The Solo Woman in a Professional Peer Group, 45 Am. J. Orthopsychiatry 164 (1975); .

The implications of these research results are that impermissible sex-based factors are likely to block the attempts of women like Ann Hopkins to advance in careers from which women have previously been excluded. The effect is not just attributable to categorization and ingroup/outgroup dynamics, however. Sex-based categories are heavily laden with extensive social meanings and that baggage becomes applied when an individual is categorized based upon sex.<sup>12</sup> Despite the apparent fluidity of sex role definitions in contemporary society, the social science research demonstrates a notable consistency in the different traits, characteristics and behaviors considered appropriate and desirable in men and women.

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<sup>12</sup> See Fiske & Taylor, supra n. 7, at 139-189; Taylor, supra n. 6.

Studies show that overall, women are expected to be passive, nurturing, and emotive and not to be aggressive, egotistical and competitive. Men, on the other hand, are expected to possess what is referred to as the "competency cluster of traits," e.g. independence, ambition, competitiveness, and control.<sup>13</sup> Research reveals that as women have moved into such traditionally "male" fields as law, accountancy and management consulting, there is a degree of acceptance of women as competent, strong and professional, but only so long as they continue to display the traits of the stereotypically female

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<sup>13</sup> Ruble, Sex Stereotypes: Issues of Change in the 1970s, 9 Sex Roles 397 (1982); Broverman, Vogel, Broverman, Clarkson & Rosenkrantz, Sex Role Stereotypes: A Current Appraisal, 28 J. of Soc. Issues 59 (1972).

"warmth-expressiveness cluster".<sup>14</sup> The research also shows that when women violate traditional sex role expectations, others tend to react negatively. Feelings of disappointment, irritation and anger are common responses to those who do not conform.<sup>15</sup> Interestingly, men have a wider latitude of acceptable traits and behaviors than do women<sup>16</sup>, particularly in the workplace. The men who have risen to the top of corporate America are described by those who work under them and by the media, as

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<sup>14</sup> Broverman, supra n.13; A. Morrison et al., supra, n.5, at 54-56.

<sup>15</sup> N. Henley, Body Politics 197 (1977); V. Nieva & B. Gutek, supra n.4, at 76.

<sup>16</sup> E. Schur, supra n.4, at 134.

everything from "mild mannered"<sup>17</sup> to "manag[ing] by intimidation".<sup>18</sup>

Some of these points were brought out in Dr. Fiske's testimony. But this knowledge is not the province only of social scientists. People who care about the problems of inequality or the loss of human capital when managerial decisions are based upon sex (or race) rather than actual

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<sup>17</sup> "A Humble Hero Drives Ford To The Top," Fortune, January 4, 1988 at 23, describing the Chairman of the Ford Motor Company.

<sup>18</sup> "How Tom Mitchell Lays Out The Competition," Fortune, March 30, 1987 at 91, describing the President of Seadate Technology. In an article describing some of the country's most prominent male executives, such as General Electric's Chairman, Simon & Schuster's President and Gulf & Western's Chief Executive Officer, Fortune Magazine wrote, "[i]f you want to know how tough they can be, ask the people who work for them - the subordinates who have to put up with ego-shredding, criticism, insatiable demands, and Wagnerian fits of anger." "The Toughest Bosses in America," Fortune, August 6, 1984 at 18.

ability or performance are instinctively aware of the dynamics of sex stereotyping. Moreover, sex stereotyping is preventable; it is possible to perceive and judge others, even tokens, based upon their individual characteristics and behavior rather than through the prism of their sex. Caring, taking time and paying attention to tangible performance requirements and actual performance, not generalized, ambiguous characteristics such as those used by Price Waterhouse, helps. Being aware of one's own thought-processes and staying alert for evidence of sex stereotyped thinking -- the tell-tale words, phrases and concepts prevalent in Price Waterhouse's partners' discussions of Ann Hopkins' candidacy -- also curtails



stereotyped decision-making.<sup>19</sup> Finally, as the proportion that any minority represents in a larger group increases, the pressures to stereotype diminish.

I. The Record is Replete with Evidence of Intentional Sex Discrimination, Both Direct and Circumstantial.

Ann Hopkins was an exceptionally well-qualified partnership candidate. "None of the other candidates considered for partnership in 1983 had generated more business for Price Waterhouse than plaintiff." Hopkins v. Price Waterhouse, 825 F.2d 458, 462 (D.C. Cir. 1987) (citing Hopkins, 618 F. Supp 1109, 1112 (D.D.C.

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<sup>19</sup> See generally S. Fiske & S. Taylor, supra n.7, at 139-81; Fiske & Neuberg, A Continuum of Impression Formation from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation, in 23 Advances in Experimental Interpretation (M. Zanna ed. 1988); Heilman, supra n.4, at 289-92; Ruble, Cohen & Ruble, Sex Stereotypes: Occupational Barriers for Women, 27 Am. Behav. Scientist 339 (1984).

1985)). "She billed more hours than any of the other candidates under consideration." Id. The clients whom she served liked her work. See Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985).

Yet, the comments by the evaluating partners show that their focus was on her gender, not her business acumen. Her critics and supporters alike couched their evaluations of her in gender specific terms. It was said that "she ... over-compensated for being a woman," and that she "had matured from a ... somewhat masculine ... mgr. [manager] to [a] ... much more appealing lady partner candidate." Id. at 1116-1117. One partner described her as "macho." Id. at 1117.

It is clear from the record that Hopkins' perceived deficiencies lay in her failure to conform to sex-based behavioral stereotypes. Ann Hopkins was evaluated as

a "lady partner candidate," according to standards applicable only to female candidates. She was a "tough-talking," "formidable" woman whose use of "foul language" was offensive only because, as one partner explained, "it's a lady using foul language." Id. She was explicitly told, by a partner who conveyed the information as to why her partnership consideration was deferred and how she might do better,<sup>20</sup> to "walk more fem-

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<sup>20</sup> That many of the obviously sex stereotyped comments about Ann Hopkins quoted in the District Court's opinion were made by her supporters, rather than her detractors, does not mean that Hopkins' gender was not a significant factor in Price Waterhouse's refusal to promote her. The comments by Hopkins' staunchest supporters demonstrate their awareness that Hopkins' nonconformity to the stereotype of the "acceptable" female was working against her and that she was being held to a different standard of behavior than male partnership candidates. Her supporters understood that if she conformed to sex stereotypes, she might be accepted. That her supporters were aware that Ms. Hopkins was judged according to gender specific

ininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. Therefore, she was evaluated according to standards applicable only to female candidates.

Such evidence is more than sufficient to establish a case of intentional discrimination based largely on direct evidence, not on inferences. The discriminatory process to which Hopkins was subjected was not an isolated event. In fact, the sex-based comments made about her were "part of the regular fodder of partnership evaluations." Id. Female candidates for partnership had previously been denigrated for

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standards and that they advised her to comply with those standards does not, erase the discrimination upon sex, as Judge Williams, dissenting from the court of appeals decision, erroneously concluded; it compounds it. See Connecticut v. Teal, 457 U.S. 440 (1982) (holding that discrimination in a decision process is not eliminated by an apparently nondiscriminatory outcome).

their feminist politics and their unfeminine manners. Id. One partner categorically refused to consider any woman seriously for partnership and "believed that women were not even capable of functioning as senior managers." Id. Discriminatory intent is also evident from the history of sex-segregation in the job,<sup>21</sup> and the use of a male dominated subjective promotion process that credited biased evaluations and was consciously retained by the company despite evidence that it was tainted by sex stereotypes. Id.<sup>22</sup>

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<sup>21</sup> The fact that Anne Hopkins was the only woman among 88 candidates and was being evaluated for partnership by an organization having 662 male and partners and only seven female partners demonstrates the overwhelming historical sex-segregation in this professional milieu.

<sup>22</sup> As the district court noted, "whenever a promotion system relies on highly subjective evaluations of candidates by individuals or panels dominated by members of a different sex ... such procedures must be closely scrutinized because

Finally, the testimony of Dr. Fiske established discrimination. Dr. Fiske examined the record created in connection with Price Waterhouse's partnership decision-making. She found all of the antecedent conditions that, according to the research, strongly indicate that stereotyping is likely to take place--rarity of the target, selectivity of perception and memory by the target's evaluators, extremely negative reactions and broad overgeneralizations by her detractors, to name only a few factors. She also found the factor most obvious to the lay observer - the extensive discussions referring to Hopkins' sex. Finally she found no factors indicating that the

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of their capacity for masking unlawful bias." Hopkins, 618 F. Supp. 1109, 1119 (quoting Davis v. Califano 613 F.2d 957, 965 (D.C. Cir. 1979)). See also, Coble v. Hot Springs School District No. 6, 682 F. 2d 721, 726 (8th Cir. 1982).



influences of stereotypes would be avoided in the ultimate outcome. Based upon these indicators, she concluded that sex stereotyping was important in Price Waterhouse's decision about Ann Hopkins' candidacy. See Fiske Testimony. The court accepted this testimony.<sup>23</sup> Thus the promotion process

<sup>23</sup> Dr. Fiske is an extremely well-qualified researcher in the field of social cognition including sex stereotyping, trained as well in the research on organizational behavior, the author of numerous articles and a leading text on the subject of social cognition. The methodology applied by Dr. Fiske in reaching that conclusion in this case, grounded as it is in extensive research and drawing from the evidence created in the ordinary course of the subject's daily events without further intrusion by the researcher, is an accepted and respected mode of research in its own right. See E. Webb, D. Campbell, R. Schwartz & L. Sechrest, Unobtrusive Measures: Nonreactive Research in the Social Sciences (1966). The research on stereotypes confirms that where stereotyping is evidenced the stereotyped category, i.e. the sex or race of the target is the causal factor. S. Fiske & S. Taylor, supra n.7, at 138-89. See H. Blalock, Causal Inferences in Nonexperimental Research (1964) (explaining causal analysis in research).

itself was "impermissibly infected by sexual stereotypes." Hopkins v. Price Waterhouse, 825 F.2d 458, 468 (D.C. Cir. 1987).

Such a process in and of itself violates Title VII.<sup>24</sup> To end employers'

<sup>24</sup> Bibbs v. Block, 778 F.2d 1318, 1321 (8th Cir. 1985). In Bibbs, one of the key players in the promotion process was known to utter racial slurs. The court held that "[f]orcing Bibbs to be considered for promotion in a process in which race plays a discernible part is itself a violation of the law, regardless of the outcome of the process." Bibbs, 778 F.2d at 1322. See also Fields v. Clark Univ., 817 F.2d 931, 935-37 (1st Cir. 1987) (tenure decision found to be impermissibly tainted by "pervasively sexist attitudes"); Fadhl v. City and County of San Francisco, 741 F.2d 1163 (9th Cir.), aff'd after remand, 804 F.2d 1097 (9th Cir. 1984) (court held that employer's statements about plaintiff's femininity were evidence that she was held to a different, sex-linked standard and required an initial finding of Title VII liability); Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983), cert denied, 469 U.S. 979 (1984) (employer's reference to plaintiff's femininity was found to evince a sex stereotyped view of her physical abilities and was "the kind of invidious discrimination that violates Title VII"); EEOC v. FLC

reliance on outmoded sex stereotypes of the sort present in this case was a primary congressional purpose in enacting Title VII:

Women are subject to economic deprivation as a class ... Numerous studies have shown that women are placed in the less challenging, the less respon-

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and Brothers Rebel, Inc., 663 F. Supp. 864 (W.D. Va. 1987) (court found discriminatory animus in employer's statement that he fired woman bartender for her use of "unladylike language")

In a related context, this Court has held that plaintiff may establish a violation of Title VII by proving that sex discrimination created a hostile or abusive work environment. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). See also Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981) (sexually stereotyped insults and demeaning propositions that poison one's working environment violate Title VII). The very maintenance of a hostile work environment may lead to the conclusion that promotion decisions made in that context were discriminatory. See, e.g., Broderick v. Ruder, No. 86-1834, slip op. (D.D.C. May 13, 1988) (that SEC superiors permitted sexually harassing working conditions to be created and refused to remedy environment compels conclusion that plaintiff lost promotion and job opportunities because of the hostile climate).

sible and the less remunerative positions on the basis of their sex alone.... The time has come to bring an end to job discrimination once and for all, and to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities.<sup>25</sup>

As this Court stated in City of Los Angeles Department of Water and Power v. Manhart:

Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply....[T]he statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.

435 U.S. at 708-09. See also Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring) (Title

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<sup>25</sup> H.R. Rep. No. 889, 92d Cong. 2d Sess. 1 (1972), reprinted in 1972 U.S. Code Cong. & Admin. News 2140, 2141 (1972) (Legislative History of the Equal Opportunity Act of 1972).



VII does not permit "ancient canards" about women to be a basis for discrimination).<sup>26</sup> Thus, this Court has refused to allow fringe benefits to depend on sex, notwithstanding valid longevity statistics (Manhart); it has refused to permit

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<sup>26</sup> This Court has in the equal protection context recognized the discrimination inherent in the "baggage of sexual stereotypes" which is used to classify, limit, protect or otherwise needlessly differentiate between men and women, to the historical disadvantage of women as a class. Orr v. Orr, 440 U.S. 268, 283 (1979); Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973). In Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984), this Court noted:

[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society of the benefits of wide participation in political, economic, and cultural life.

See also Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

negative assumptions about women's ability to combine paid work with parental responsibilities to affect employment decisions (Phillips). Consistent with this precedent, there is no basis to permit Price Waterhouse to make promotion decisions in express reliance on stereotypical notions about "ladylike" behavior, especially when such behavior is palpably unrelated to job performance.<sup>27</sup>

The courts below designated this a "mixed" or "dual motive case" - one in

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<sup>27</sup> Whether Hopkins' personality characteristics could be job-related is not presented by this case, since she clearly was more than capable of performing the significant elements of her job. Nor can the associational interests of the partners create a legitimate reason to deny her advancement, given that Price Waterhouse, a business with over 650 partners, is not an exclusive group. See Hishon v. King & Spalding, 467 U.S. 59 (1984). Some of Price Waterhouse's arguments seem to be based on a need to satisfy "customer preference", but in fact Hopkins' customers were well pleased with her services.



which the defendant is motivated by both illegal and legal considerations. To the contrary, the proof was that defendant was motivated by only one consideration, plaintiff's gender. As discussed above, plaintiff's personality and personality-related conduct were perceived as inappropriate because of her gender. Neither defendant nor plaintiff nor the court could be expected to isolate defendant's perceptions, recollections and inferences about Hopkins made through the interpretive lens of sex stereotypes from defendant's allegedly non-sex-based subjective reactions to Ms. Hopkins' personality.<sup>28</sup>

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<sup>28</sup> In a true "dual motive" case, the permissible and impermissible motives are to some degree, separate. For instance, one could imagine a mixed motive case in which the court accepts proof of discriminatory bias and the defendant asserts that its decision was based instead on the fact that the plaintiff embezzled funds in the job. In such a case, the fact that the plaintiff committed a felony is distinct

Moreover, it is virtually impossible fairly to examine Hopkins' conduct without taking into account the discriminatory conditions under which Ms. Hopkins had to perform her job, knowing that her evaluators were using her sex as the basis of their perceptions of and assumptions about her.<sup>29</sup>

Indeed, if anything, this case is more akin to "sex-plus" cases. In the first "sex-plus" case, Martin Marietta attempted to exonerate its refusal to hire women, but not men, who had preschool aged children by claiming that the burden of women's family responsibilities were its operative motivation. Phillips v. Martin Marietta

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from the proven discriminatory bias. As a factor in job suitedness, it is capable of separate evaluation in a way that an allegation about an individual's personality is not.

<sup>29</sup> See Hamilton, et al., The Emotional Consequences of Gender-Based Abuse in the Workplace, 6 Women and Therapy 155 (1987); Taub, supra n.2, at 357-360.

Corp., 400 U.S. 542 (1971). This Court rejected that argument. Price Waterhouse similarly attempts to exonerate its refusal to promote Hopkins on the alleged grounds of her "poor interpersonal skills," where men's interpersonal skills did not block their advancement. This is no more availing.

Assumptions based on the sex of the individual constitute intentional discrimination in its classic form. This is true regardless of the precise nature of the sex-based assumptions, which have taken many forms as the cases demonstrate. Title VII forbids employment decisions that are so tainted.

II. The Direct Evidence of Sex Discrimination Here Establishes Liability Under Title VII and Requires That the Burden Shift to Defendant To Show That No Relief Should Be Granted.

Title VII is violated once race or sex is shown to be a factor in the employment

decision. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977). This was made clear when the statute was originally proposed: "What this bill does...is simply to make it an illegal practice to use race as a factor in denying employment."<sup>30</sup> This showing is sufficient to award plaintiff relief unless the defendant proves that relief would clearly be inappropriate.

As demonstrated above, the record was replete with evidence that Price Waterhouse relied on sex-specific behavioral requirements and sex-stereotypical notions of personality characteristics. This evidence alone is sufficient to establish liability under Title VII. Whether Hopkins was entitled to a partnership, or whether there

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30. Remarks by Senator Humphrey, 110 Cong. Rec. 13,088 (1964). See also remarks by Senator Case, 110 Cong. Rec. 13,837-13,838 (1964).

was a wholly independent and separate ground on which its denial can be justified, is another question - one of remedy - as to which the defendant bears the burden of proof.

A. With Direct Evidence of Intentional Discrimination a Title VII Violation is Shown and the Burden of Proof Shifts

This Court has held that proof of discriminatory motive "change[s] the position of the employer to that of a proved wrongdoer." Teamsters, 431 U.S. at 360 n.45. This occurs without any inquiry into the qualifications of a particular individual for a particular position,<sup>31</sup> which is solely relevant to the question of remedy. The initial "liability" determination turns on evidence of discriminatory

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<sup>31</sup> The Teamsters opinion notes that the absence of individual injury flowing from discriminatory conduct is a question not relating to liability but to relief. Id. at 344 n.24.

conduct.<sup>32</sup> Once discrimination has been found, an individual plaintiff or class member enjoys "a rebuttable presumption in favor of individual relief," Teamsters, 431 U.S. at 359 n.45, and the burden shifts to the "employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." Id. at 362.<sup>33</sup>

The shift of the burden of persuasion

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<sup>32</sup> Bifurcated proceedings as to liability and remedy are often held in Title VII cases.

<sup>33</sup> This burden cannot be satisfied simply by asserting that the best qualified candidates had been hired. Teamsters, 431 U.S. at 344 n.24. Likewise, in constitutional cases this Court has found "simple protestations" that discrimination did not affect the result "insufficient." Castaneda v. Partida, 430 U.S. 482, 498 n.19 (1977). Accord Alexander v. Louisiana, 405 U.S. 625, 632 (1972). See point IIc infra.



is appropriate:<sup>34</sup> proof of discriminatory motive radically alters the position of the Title VII defendant to that of a "proved wrongdoer." By separating the issue of liability from that of relief, as this Court has traditionally done in Title VII cases, it becomes possible to adjust the burden on the defendant in accord with its changed status. Proof of bias creates liability and a presumption in favor of relief. It does not automatically compel a specific remedy in an individual instance,

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<sup>34</sup> Similarly, this Court has approved separating the question of liability from that of remedy in individual cases under Title VI and the equal protection clause, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978) (Powell, J., for the Court) (whether Bakke would have been admitted goes to the issue of relief, not liability), and under the due process clause, Carey v. Piphus, 435 U.S. 247, 266 (1978) (the right to due process is "absolute" and "does not depend upon the merits of a claimant's substantive assertions").

but the employer does and should bear a heavy burden to prove that the applicant or employee who was subjected to a discriminatory practice did not actually suffer as a result.<sup>35</sup>

Similarly the difficulty of separating illegal from legal motives is a burden which the defendant, as wrongdoer, should properly bear. As this Court has explained:

The employer is a wrongdoer, he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was not created by innocent activity but by his own wrong-doing.

NLRB v. Transportation Management Corp.,  
462 U.S. at 403 (1983) (construing National

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<sup>35</sup> Especially in this situation, there is "[n]o reason ... why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue." Franks v. Bowman Transp. Co., 424 U.S. 747, 773 n.32 (1976).

Labor Relations Act). See also League of United Latin American Citizens v. City of Salinas Fire Dep't, 654 F.2d 557, 559 (9th Cir. 1981) (Title VII); King v. Trans World Airlines, 738 F.2d 255, 257 (8th Cir. 1984) (Title VII).

Requiring plaintiff to prove more than the presence of discrimination in the employment process to establish liability would undermine the purposes of Title VII. As Justice Scalia noted in Toney v. Block, 705 F.2d 1364, 1366 (D.C. Cir. 1983): "[I]t is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor."

In fact, Congress specifically rejected an amendment which would have

imposed this impossibly heavy burden on plaintiff.<sup>36</sup> 110 Cong. Rec. 13,838 (1964). In analogous contexts, this Court has approved shifting the burden to the employer to show that the same decision would have been reached absent discrimination "when there is a proof that a discriminatory purpose has been a motivating factor in the decision...." Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977).

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<sup>36</sup> Congress rejected an amendment that would have required a plaintiff to show that a prohibited basis was "solely" the basis for an adverse employment decision. 110 Cong. Rec. 13, 837 (1964) (Amendment proposed by Senator McClellan; Senator Case explaining that proposed amendment would render Title VII "nugatory").

While the Court has occasionally described Title VII proof in terms of a "but for" test, e.g., McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976), this language has to be read in light of the fact that Congress explicitly rejected the proposed amendment.

In such a case, "judicial deference is no longer justified." Id.

Some decisions appear to require a showing that an unlawful motive was a "substantial" factor in the challenged decision before shifting the burden to the defendant to prove that the "same decision" would have been reached anyway.<sup>37</sup> These are constitutional cases in which the burden on the plaintiff is concededly greater than in the Title VII context<sup>38</sup>. Even in constitutional challenges, however, this approach has not been consistently followed,<sup>39</sup> and it is inappropriate, in

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<sup>37</sup> See, e.g., Hunter v. Underwood, 471 U.S. 222, 228 (1985) (equal protection); Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977) (first amendment).

<sup>38</sup> Cf. Washington v. Davis, 426 U.S. 229 (1976); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979)

<sup>39</sup> Compare, e.g., Carey v. Piphus, 435 U.S. 247, 266 (1978).

discrimination cases, to attempt to quantify or calibrate the amount of discrimination and then determine how much is unlawful, before shifting ~~the~~ burden to defendant. This Court has explained:

"[I]nvidious discrimination does not become less so because the discrimination is a lesser magnitude. Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced choice or it is not."

Personnel Adm'r of Mass. v. Feeney, 447 U.S. 256, 277 (1979) (footnote omitted).

The approach adopted in Teamsters avoids the calibration problem and best effectuates the intent of the Title VII drafters to eradicate employment discrimination in all its manifestations. It recognizes that proof of discrimination, in and of itself, constitutes a cognizable injury for which liability attaches. See also Heckler v. Mathews, 465 U.S. 728 (1984). Although a presumption in favor of



make whole relief arises, defendant may nonetheless prove that the discrimination did not cause the specific injury complained of, and that the specific make whole relief requested is not warranted. This formulation derives directly from authoritative Title VII caselaw and is consistent with caselaw in analogous areas involving discrimination; it provides a clear, uniform, familiar, and workable analysis for "mixed motive" situations; and it would provide the same degree of statutory protection to plaintiffs in this category of cases as has traditionally been enjoyed by other Title VII plaintiffs.

B. The Burden-shifting Formulation of Burdine and McDonnell Douglas is Inappropriate Here.

The petitioner incorrectly asserts that the burden-shifting approach in cases

such as Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), and McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973), is appropriate here. That analysis applies where plaintiffs, in order to establish a prima facie case, rely on circumstantial evidence supporting an inference of discrimination. As explained in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume that these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Thus, the Court said in Burdine, 450 U.S. at 255 n.8, that the "allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."

Proof of discriminatory motive is the end-point contemplated by the Burdine analysis. In this case, Hopkins proved through direct evidence that Price Waterhouse considered her gender in evaluating her candidacy for promotion. Under Burdine and Furnco, she thus satisfied her ultimate burden, and the kind of defense those cases contemplate was no longer available.

This Court has held squarely that the burden shifting formula set forth in McDonnell Douglas is "inapplicable where the plaintiff presents direct evidence of discrimination." Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). "The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that 'the plaintiff [has] his day in court despite the unavailability of direct evidence'" Id. (citation omitted).

The Burdine formula was not meant to be a "Procrustean bed within which all disparate treatment cases must be forced to lie." Bell v. Birmingham Linen Services, 717 F.2d 1552, 1556 (11th Cir. 1983), cert. denied, 467 U.S. 1204 (1984). See also United Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983) (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) (citations omitted) ("the prima facie case method established in McDonnell Douglas was 'never intended to be rigid, mechanized, or ritualistic'")).

The Courts of Appeals have uniformly recognized the inapplicability of the Burdine approach in cases presenting direct evidence of discrimination. For instance, in Bell v. Birmingham Linen Services, 715 F.2d 1552 (11th Cir. 1983), cert. denied, 467 U.S. 1204 (1984), the Eleventh Circuit noted:

If the evidence consists of direct testimony that the defendant acted with discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved. Defendant cannot refute this evidence by mere articulation of other reasons; the legal standard changes dramatically.

Id. at 1557. This approach has been widely endorsed.<sup>40</sup>

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<sup>40</sup> Terbovitz v. Fiscal Court of Adair County, Ky., 825 F. 2d 111, 114-5 (6th Cir. 1987) ("The McDonnell Douglas formula is inapplicable ... to cases in which the ... plaintiff presents credible, direct evidence of discriminatory animus."); Goodman v. Lukens Steel, 777 F.2d 113, 130 (3rd Cir. 1985), aff'd, \_\_\_ U.S. \_\_\_, 107 S.Ct. 2617 (1987) ("The presumptions and shifting burdens are merely an aid - not ends in themselves. When direct evidence is available, problems of proof are no different than in other civil cases."); Miles v. MNC Corp, 750 F.2d 867, 875 n. 9 (11th Cir. 1985)(quoting Lee v. Russell County Board of Education, 684 F.2d 769, 774 (11th Cir. 1982) (where the evidence consists, as it does here, of direct testimony that defendants acted with a discriminatory motivation, "if the trier of fact believes the prima facie evidence, the ultimate issue of discrimination is proved, no inference is required.")); Lewis v. Smith, 731 F.2d 1533, 1537-1538 (11th Cir. 1984) (where discriminatory intent has been proved by direct evidence, the ultimate

Price Waterhouse's characterization of this as a "mixed motive" case does not make the Burdine formula any more applicable.<sup>41</sup>

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issue is proved); Muntin v. State of California Parks and Recreation Department, 671 F.2d 360, 363 (9th Cir. 1982), aff'd, 738 F.2d 1054 (1984) (where plaintiff proves discriminatory animus by direct evidence, "this ... not only permits, but compels an inference [of discrimination]. That being so, there is no need, for the purpose of deciding whether a Title VII violation has occurred, to consider the explanations which an employer might claim ....No such explanation could be sufficient, as a matter of law, to justify a judgment that unlawful discrimination did not occur."); Loeb v. Textron, 600 F.2d 1003, 1014 (1st Cir. 1979) (Burdine approach is inapplicable where plaintiff relies on direct evidence of discrimination).

<sup>41</sup> That Burdine did not contemplate the so-called "mixed-motive" case is obvious. In Burdine, as this Court discussed in an analogous context, "the question was who had '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against plaintiff ....' The Court discussed only the situation in which the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision." NLRB v. Transportation Management Corp., 462 U.S. 393, 400 n. 5 (1983) (citation omitted). See also,



As the Eleventh Circuit noted in Bell, it would be "illogical" and "ironic" if direct evidence of motive or conduct forbidden by Title VII could be negated by the mere articulation, not proof, that the employment decision was undertaken for permissible reasons.<sup>42</sup> In almost every circuit, once plaintiff proves by direct evidence the presence of discrimination, the burden is placed on the defendant to prove that a remedy should not be required.<sup>43</sup>

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Bibbs v. Block, 778 F.2d 1318, 1320-21 (8th Cir. 1985).

<sup>42</sup> In addition, this allocation of the burden is in accord with the principle of placing upon a party the burden of proving facts peculiarly within its own knowledge. United States v. New York, N.H. & Hartford R.R., 355 U.S. 253, 256 n.5 (1957). See also C. McCormick, Evidence, §337 (1984).

<sup>43</sup> Whether or not the inquiry is separated into liability and remedy phases, the burden shifts to defendant to prove that the plaintiff is not entitled to relief. See, e.g., Fields v. Clark

C. Where the Plaintiff has Proved that the Employment Decision Was Tainted by Discrimination, The Purposes of Title VII Can Be Served Only by Requiring the Defendant to Meet a Clear and Convincing Evidentiary Standard.

The twin goals of Title VII-- deterring illegal conduct by employers and affording employees make whole relief-- are aptly served by requiring a defendant, upon a showing by direct evidence of discriminatory intent, to show by clear and

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University, 817 F.2d 931 (1st Cir. 1987); Haskins v. United States Dept of the Army, 808 F.2d 1192 (6th Cir.), cert. denied, 108 S.Ct. 68 (1987). Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); Smallwood v. United Airlines, Inc., 728 F.2d 614 (4th Cir.), cert. denied, 469 U.S. 832 (1984); Fadhl v. City and County of San Francisco, 741 F.2d 1552 (9th Cir. 1984); Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983), cert. denied, 467 U.S. 1204 (1984); Day v. Matthews, 530 F.2d. 1083 (D.C. Cir. 1976); But see McQuillen v. Wisconsin Education Ass'n Council, 830 F.2d 659 (7th Cir. 1987), cert. denied, 108 S.Ct. 1068 (1988), Lewis v. University of Pittsburgh, 725 F.2d 910 (3rd Cir.), cert. denied, 469 U.S. 892 (1984).

convincing evidence that the plaintiff would have suffered the challenged adverse employment action even absent discrimination. Title VII was "intended to strike at the entire spectrum of disparate treatment." City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n. 13 (1978). See also McDonnell Douglas Corp. v. Green, 411 U.S. at 801: "Title VII tolerates no ... discrimination, subtle or otherwise." The primary thrust of Title VII is to "eradicat[e] discrimination throughout the economy and [to make] persons whole for injuries suffered through past discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

Title VII's protection is a narrow but stringent prohibition against discrimination based on certain immutable characteristics enumerated as prohibited bases in the statute, in one and only one context--

that of employment. Because it narrowly focuses solely on the employment context, in contrast to the broader sweep of the equal protection clause which reaches the full range of employment and nonemployment government action, this Court and Congress have recognized that it is appropriate to place more stringent requirements on the defendant employer under Title VII than under the equal protection clause.<sup>44</sup> Title VII's remedial and deterrent purposes are best served by imposing a clear and

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<sup>44</sup> Compare Washington v. Davis, 426 U.S. 229 (1976) (equal protection does not reach neutral action with discriminatory effect without a showing of intent) with Griggs v. Duke Power Co., 401 U.S. 424 (1971) (liability in Title VII may be imposed upon a showing of discriminatory impact; explicit discriminatory intent need not be proved); compare Geduldig v. Aiello, 417 U.S. 484 (1974) (employment discrimination against pregnant women does not violate the equal protection clause) with Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (amending Title VII to define pregnancy discrimination as sex discrimination).

convincing evidentiary standard on defendants who have acted illegally. "By making it more difficult for employers to defeat successful plaintiffs' claims ... the higher standard of proof might well discourage unlawful conduct by employers." Toney v. Block, 705 F.2d at 1373 (Tamm, J., concurring).

A preponderance of the evidence standard is appropriate only where the interests of the parties are balanced and it is just that they share equally the "risk of error." Herman and MacLean v. Huddleston, 459 U.S. 375, 390 (1983). See also Addington v. Texas, 441 U.S. 418, 423 (1979). However, where the interests weigh more heavily in favor of one party, the more stringent clear and convincing evidence standard must be imposed. Huddleston, 459 U.S. at 389.

The interest of an employee not to be harmed in his or her ability to make a livelihood because of his or her race, sex, national origin or religion is far superior to the interest of an employer to make employment decisions based upon such prohibited characteristics. See Hishon v. King & Spalding, 467 U.S. 59, 68-69 (1984). Once the defendant in a Title VII case has been proved to engage in discriminatory conduct, it is only fair and equitable that such a "proved" wrongdoer should bear the lion's share of the risk of error: "The higher standard of proof is justified by the consideration that the employer is a proved wrongdoer whose unlawful conduct has made it difficult for the plaintiff to show what would have occurred in the absence of that conduct." Toney v. Block, 705 F.2d 1364, 1373 (D.C. Cir. 1983) (Tamm, J., concurring). As noted by the D.C. Circuit



in Day v. Mathews, "[i]t is now impossible for an individual discriminatee to recreate the past with exactitude ... because of the employer's unlawful action; it is only equitable that any resulting uncertainty be resolved against the party whose action gave rise to the problem." 530 F.2d 1083, 1086 (D.C. Cir. 1976) (citation omitted).

This standard is routinely applied to defendants in a number of circuits. The D.C. Circuit was the first to apply it in Day v. Mathews, 530 F.2d 1083 (D.C. 1976). In Day, the plaintiff proved discrimination by circumstantial evidence and sought retroactive relief. The defendant did not contest the finding of discrimination on appeal. The Court placed the burden on the employer to defeat plaintiff's claim for retroactive relief and required the employer to meet a clear and convincing evidentiary standard because of both the

deterrent and make whole purposes of Title VII. Id. at 1086.<sup>45</sup>

The Ninth Circuit also applies this standard to employers at the remedy stage

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<sup>45</sup> For a fuller explication of Day v. Mathews as interpreted by the U.S. Court of Appeals for the District of Columbia, see Milton v. Weinberger, 696 F.2d 94, 97-99 (D.C. Cir. 1982). See also Bundy v. Jackson, 641 F.2d 934, 951 (D.C. Cir. 1981) (where discriminatory work environment is shown, burden shifts to employer to show by clear and convincing evidence that particular employment action was not the result of discrimination). But see Johnson v. Brock, 810 F.2d 219, 224 (D.C. Cir. 1987) (Day applies only after plaintiff has established a statutory violation with respect to the particular position for which retroactive relief is sought); Toney v. Block, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (same).

Here, plaintiff has shown by direct evidence that discrimination played a significant role in the decision not to promote her. See pp. 22-29 supra. Accordingly, plaintiff's proof is considerably more substantial than that presented in Toney v. Block, 705 F.2d 1364 (D.C. Cir. 1983). In Toney, the district court found that race was not a factor in the promotion decision at issue. Plaintiff showed only that race played a role in another employment context which plaintiff argued might have influenced the promotion decision. Id. at 1365.

of litigation. See, e.g., Muntin v. State of Cal. Parks and Recreation Dep't, 671 F.2d 360, 362-63 (9th Cir. 1982), aff'd, 738 F.2d 1054 (9th Cir. 1984); Marotta v. Usery, 629 F.2d 615, 618 (9th Cir. 1980). In the Ninth Circuit once plaintiff has established initial liability by proving by direct evidence that discrimination played a significant factor in the adverse employment decision, she is entitled to prospective relief. Retroactive relief is forthcoming unless the defendant shows by clear and convincing evidence that the same decision would have been reached absent the discrimination. The Fourth and Eleventh Circuits have imposed a clear and convincing evidence standard on defendants who have an immediate or recent past history of discrimination. See, e.g., Gilcrest v. Bolger, 733 F.2d 1551, 1554 (11th Cir. 1984); Knighton v. Laurens County School

Dist., 721 F.2d 976 (4th Cir. 1983). The Fourth Circuit has also established clear and convincing evidence as the appropriate standard where plaintiff proves discrimination by direct evidence. Patterson v. Greenwood School District 50, 696 F.2d 293 (4th Cir. 1982). In Patterson, the plaintiff produced evidence of sex stereotyping in the decision not to promote her to principal. 696 F.2d at 294.<sup>46</sup> As in the Ninth and D.C. Circuits, this burden is applied to defendant at the remedy stage of litigation, once liability for injunctive

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<sup>46</sup> The district court based its finding of discrimination in part on the subjective and male dominated selection procedure and evidence that the committee was searching for a candidate who fit a male stereotype. Plaintiff was penalized in the process for her "nervousness," "high-pitched voice" and "over-domineering personality." Patterson, 696 F.2d at 294.

relief has been imposed.<sup>47</sup> See also Price v. Denison Independent School Dist., 694 F.2d 334, 376 n. 78 (5th Cir. 1982) (application of clear and convincing evidence standard in Fifth Circuit).<sup>48</sup>

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- 47 Similarly, in class action discrimination cases, several circuits have held the employer as a proven wrongdoer to a clear and convincing evidence standard to rebut a showing of entitlement to relief. See, e.g., Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1561 (11th Cir. 1986), cert. denied, \_\_\_ U.S. \_\_\_, 107 S. Ct. 274 (1986); McKenzie v. Sawyer, 684 F.2d 62, 77 (D.C. Cir. 1982); League of United Latin American Citizens v. City of Salinas, 654 F.2d 557, 558 (9th Cir. 1981); Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 444 (5th Cir.) cert. denied, 419 U.S. 1033 (1974).

48 Only two circuits explicitly reject the clear and convincing evidence standard in Title VII cases involving direct evidence of discrimination. Fields v. Clark University, 817 F.2d 431, 437 (1st Cir. 1987); Craik v. Minnesota State University Board, 731 F.2d 465, 470 n.8 (8th Cir. 1984). The preponderance of the evidence standard has been applied elsewhere, but with no discussion of the reason for its use instead of the clear and convincing evidentiary standard.

Finally, clear and convincing evidence is required of defendants in actions before the EEOC. See EEOC Remedial Actions, 29 C.F.R. 1613.271 (1980). The guidelines, while not controlling upon the courts, "do constitute a body of experience and informed judgment to which courts and litigants properly resort for guidance." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)).

Price Waterhouse was properly held to a clear and convincing evidentiary standard in this case. Plaintiff proved by direct evidence that discriminatory bias played a significant role in the decision not to promote her to the position for which retroactive relief was sought. Defendant's status was therefore elevated to proved wrongdoer. In order to avoid liability for



make-whole relief, it was appropriately obligated to prove that it would have made the "same decision" absent bias by clear and convincing evidence.

#### CONCLUSION

Accordingly, this Court should affirm the decision below and remand for further proceedings consistent with that judgment.

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## APPENDIX

## APPENDIX

### Statements of Interest of Amici Curiae

The American Association of University Women ("AAUW") a national organization of over 150,000 college-educated women and men, is strongly committed to promoting and achieving legal, social, educational and economic equity for women. For more than a century AAUW has worked toward those goals by responsible participation in public policy issues at local, state, national and international levels. AAUW supports constitutional protection for the rights of all individuals and opposes all forms of discrimination. Therefore, AAUW has a strong interest in the outcome of this case.

The American Civil Liberties Union ("ACLU") is a nationwide union, non-partisan organization of over 250,000



members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU has established the Women's Rights Project to work towards the elimination of the pervasive problem of gender-based discrimination. It has participated, both directly and as amicus curiae, in the litigation of many cases before the Supreme Court and other courts challenging sex discriminatory practices.

The Employment Law Center, a project of the Legal Aid Society of San Francisco, is a private non-profit public interest law firm which specializes in employment discrimination. Founded in 1916 to represent individuals unable to afford legal counsel, the Employment Law Center is dedicated to the eradication of all forms of employment discrimination. In the area of sex discrimination, the Employment Law Center has filed amicus curiae briefs in

several cases, including California Federal Savings & Loan Association v. Guerra; Rotary Club of Duarte v. Board of Directors of Rotary International; Wygant v. Jackson Board of Education; and Meritor Savings Bank, FSB v. Vinson.

Equal Rights Advocates, Inc. (ERA) is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to secure equality for women. ERA has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. ERA has been particularly concerned with gender equality in the work force because economic independence is fundamental to women's ability to gain equality in other aspects of society. If sex-role stereotyping may be used to exclude women from full participation in the marketplace, the dream of equality will never be realized.

The Institute for Research on Women's Health ("IRWH") is the co-sponsor of Sexual Harassment and Employment Discrimination Against Women, a consumer handbook for women who are the victims of employment discrimination. The IRWH also sponsors a project called "WAGES" (Women's Action for Good Employment Standards), which provides support to victims of gender-related abuse in the workplace.

The National Bar Association, Women Lawyers Division, founded in 1925, is a professional membership organization which represents more than 10,000 Black attorneys, judges and law students. Its purposes include protecting the civil and political rights of all citizens. The NBA, through its Women Lawyers Division, has been actively involved in issues concerning equal employment opportunity. The Greater Washington Area Chapter is particularly

dedicated to addressing the needs of women in the Washington, D.C. metropolitan area.

The National Coalition for Women's Mental Health is an interdisciplinary organization established in 1985 to promote a women's health agenda. Our membership includes researchers who have contributed to the research literature that has documented the pervasiveness of gender stereotyping in the workplace, and the resulting evaluation bias that detracts from the recognition of women's achievements. Its Employment Task Force has focused on mental health effects of gender stereotyping and sex discrimination in the workplace. Along with the Institute for Research on Women's Health, the Coalition co-sponsored the consumer handbook, Sexual Harassment and Sexual Discrimination Against Women. The Coalition is honored to sign on to the women's group amicus brief in this case.

The National Conference of Women's Bar Associations (NCWBA) is a non-profit professional organization of approximately 98,000 male and female attorneys. Membership is open to all individual state, regional, and local women's bar associations. The NCWBA was formed in 1981 to promote the highest standards of the legal profession, to advance justice, to promote and protect the interests and welfare of women, and to pursue these goals through appropriate legal, social, and political action. Sexual discrimination as well as sexual harassment against women in the workplace is a common occurrence which hinders their full career development and advancement. The NCBWA supports efforts to assure that every woman be given the opportunity to enjoy a working environment free from sex discrimination.

The National Organization for Women ("NOW") is a national membership organiza-

tion of approximately 160,000 women and men in over 700 chapters throughout the country. It is a leading advocate of women's equality in all areas of life. NOW has as one of its priorities the elimination of sex-based discrimination in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended, and other civil rights statutes, and through the implementation of effective remedies for long standing discrimination against women and minorities.



The Northwest Women's Law Center is a private non-profit organization in Seattle, Washington, that works to advance the legal rights of women through litigation, education, legislative advocacy, and providing information and referrals to women with legal problems. One of the Law Center's priority issue areas is the elimination of sex discrimination in employment. The Law Center has participated in several cases involving sex discrimination in employment before the U.S. Supreme Court including California Federal Savings & Loan Association v. Guerra and Hishon v. King and Spalding.

The NOW Legal Defense and Education Fund ("NOW LDEF") was founded in 1970 by leaders of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate

sex-based discrimination and secure equal rights. A major goal of the NOW LDEF is the elimination of barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination.

The Organization of Pan Asian-American Women ("Pan Asia") is the oldest public policy oriented organization focused on concerns of Asian and Pacific Islander women in the United States. Founded in 1976, Pan Asia is a national, non-profit organization composed of Filipino, Chinese, East Indian, Japanese, Korean, Vietnamese, Pacific Islander, and other American women of Asian descent. Pan Asia seeks to insure full participation of Asian-Pacific American women in all aspects of American society, particularly in those areas where traditionally excluded or underrepresented.

Asian-Pacific American women experience the double discrimination of sex and race stereotyping. Pan Asia is particularly concerned about the "glass ceiling" phenomenon as it applies to both sex and race job promotions in professional fields.

The San Francisco Women Lawyers Alliance is a bar association comprised of women lawyers and other legal professionals in the San Francisco Bay Area. The organization has filed a number of amicus briefs and lobbied for state and local legislation affecting economic and employment opportunities for women and equal access to the courts. The Alliance is committed to the principle that employment decisions should be based on legitimate job related criteria and not on gender, including sex stereotyping.

Nadine Taub is the Director of the Women's Rights Litigation Clinic and a Professor of Law at Rutgers Law School in

Newark, New Jersey. She has litigated extensively in the areas of reproductive rights, sexual harassment and equal protection generally. Professor Taub is the author of Keeping Women In Their Place: Stereotyping Per Se As a Form of Employment Discrimination, 21 B.C.L.Rev. 345 (1980).

The Women's Bar Association of the District of Columbia is an organization of approximately 1600 women and men in the legal profession, including many members who are partners or who aspire to become partners in law firms. As a group committed to the advancement of women as attorneys and judges, the Association believes that equal criteria should apply to all candidates for promotion. The eradication of sex stereotypes from these decisions is essential to such progress.

The Women's Bar Association of Massachusetts is an organization of 1000 members which was founded in 1978 to

promote the professional advancement of women attorneys and to address the problems that women attorneys face in their profession and in the workplace. The organization also protects and promotes the interests of women generally. The WBA submits this brief in support of affirmance because of WBA's profound concern with the prevalence of sex discrimination in the workplace. The WBA's participation in Meritor Savings Bank, FSB v. Vinson, and Hishon v. King & Spaulding reflects WBA's view that Title VII, and the application of the correct burdens of proof in Title VII cases are essential to eliminating all vestiges of sex discrimination from the workplace.

The Women's Equity Action League (WEAL), was founded in 1972 as a national, non-profit membership organization specializing in economic issues affecting

women. WEAL sponsors research, education projects, litigation and legislative advocacy. WEAL is committed to the full and effective enforcement of antidiscrimination laws at both the federal and state levels to assure that all economic opportunities are available to women as well as men. WEAL has appeared as amicus curiae in numerous gender discrimination cases before this Court such as Arizona Governing Committee v. Norris, Roberts v. Jaycees, and Grove City College v. Bell .

Women Employed is a national membership association of working women. Over the past fifteen years, the organization has assisted thousands of women with problems of discrimination, monitored the performance of equal employment opportunity agencies, analyzed equal employment opportunity policies, and developed



specific, detailed proposals for improving enforcement efforts.

The Women's Legal Defense Fund is a non-profit membership organization founded in 1971 to provide pro bono legal assistance to women who have been the victims of discrimination based on sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counseling program, and advocacy before the Equal Employment Opportunity Commission and other federal agencies charged with enforcement of the equal opportunity laws.

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No. 87-1167

JOSEPH P. SPANIOLO, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1987

PRICE WATERHOUSE,

*Petitioner,*

vs.

ANN B. HOPKINS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE COMMITTEES ON CIVIL RIGHTS,  
LABOR AND EMPLOYMENT LAW, AND SEX AND LAW  
OF THE ASSOCIATION OF THE BAR OF THE CITY  
OF NEW YORK AS AMICUS CURIAE IN SUPPORT  
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BRIEF OF THE COMMITTEES ON CIVIL RIGHTS,  
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OF NEW YORK AS AMICUS CURIAE IN SUPPORT  
OF RESPONDENT, ANN B. HOPKINS

---

The Committees on Civil Rights, Labor and Employment Law, and Sex and Law of The Association of the Bar of the City of New York (the "Association"), with the consent of counsel to both parties, respectfully submit this brief on behalf of the Association as *amicus curiae* in support of respondent.

### INTEREST OF AMICUS

The Association is an organization of about 18,000 lawyers practicing or residing principally in the New York City metropolitan area. Any member of the legal profession may apply for membership in the Association.

The Association is committed to the principle of equal opportunity for all in the workplace, regardless of race, religion, sex or other group affiliation. The Association is particularly committed to eliminating invidious discrimination in the legal profession.

From 1870, when the Association was formed, until 1937, women were not admitted to membership. Today, 18% of the Association's members are women, and many of them are actively involved in the Association's work. The Executive Secretary of the Association and several members of the Association's Executive Committee, including its Chair, are women. Women sit on every one of the Association's 133 standing and special Committees and head more than twenty of those committees. In light of its history, purpose and membership, the Association is in a unique position to comment on the existence of discrimination within the legal profession, its adverse effects and the importance of its elimination.

Although sex discrimination in the professions undeniably has been reduced in recent years, the Association is concerned that subtle barriers continue to prevent women from advancing to their fullest potential. Since 1869, when Belle Babb Mansfield in Mt. Pleasant, Iowa, became the first woman to be admitted to a state bar in the United States, women have made great strides forward in their search for equality. Yet studies show that women continue to lag behind men, particularly at the highest levels of the professions.

The Association has a strong interest in ensuring that Title VII is implemented to its fullest extent to eliminate illegal barriers to employment and advancement in the professions. Because discrimination in the professions tends to be subtle, the Association believes that evidence of sex stereotyping can and will be the foundation of a Title VII claim in many cases. In this case, both the district court and the court of appeals found that sex stereotyping tainted the decision-making process with regard to respondent. Thus, the Association believes that the decision of the court of appeals should be affirmed.

### SUMMARY OF ARGUMENT

Title VII prohibits the erection of barriers to employment on the basis of discrimination because of an employee's race, sex, religion or national origin. Limitations on employment opportunities because of such classifications have been described as:

"one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies or chooses."

*Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970); *accord Rowe v. General Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972). Such limitations not only defy current standards of decency, they prevent the full utilization of human potential in the workplace.

Sex stereotyping -- that is, the expectation that an individual will or should behave in a particular way because

of his or her gender -- permeates society. Sex stereotypes undoubtedly underlie certain types of employment decisions, particularly those that are made on subjective bases. Advancement in the professions is especially susceptible to taint from discrimination rooted in stereotyped expectations, because election to partnership, tenure or their equivalent is frequently the result of evaluating subjective criteria in a consensus rather than majority rule setting. Because claims of such discrimination can be difficult to prove, it is imperative that this Court make clear that Title VII is offended if an employment decision is tainted by sex-role expectations.

The record in this case amply supports the district court's conclusion that respondent was the victim of intentional sex discrimination. At a minimum, Ms. Hopkins established that Price Waterhouse's initial decision to deny her partnership was tainted by evaluations infected by sex stereotyped expectations. Moreover, respondent's mentor, who was entrusted with the task of explaining to her why she was not made a partner in 1982, advised her that she could succeed if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled and wear jewelry" -- i.e., if she would behave more like some of the men of Price Waterhouse thought a woman should behave.

### ARGUMENT

#### **I. Sex Stereotyping Affects Employment Decisions in the Professions.**

Abundant social science research indicates that sex stereotyping -- expectations of how men and women should and do act -- affects thinking across a surprisingly vast demographic cross-section of American society. See generally

J. Chafetz, *Masculine/Feminine or Human? An Overview of The Sociology of Sex Roles* (1974); L. Duberman, *Gender and Sex in Society* (1975); Bem, *The Measurement of Psychological Androgyny*, 42 J. Consulting & Clinical Psychology 155, 157 (1974); Coser & Rokoff, *Women in the Occupational World: Social Disruption and Conflict*, 18 Soc. Probs. 535, 540 (1971). <sup>1/</sup> According to these stereotypes, men should be aggressive, independent, and capable; women should be soft, sensitive and subservient. These perceptions are rooted in centuries of western thought about the roles of men and women. Although expectations of the woman's role are often engendered by paternalism, and therefore may be perceived to be benign, they nonetheless have the effect of preventing women from sharing fully in all levels of society. Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. Rev. 345, 349-50 (1980).

With regard to sex stereotyping, certain behavior may be acceptable if exhibited by those of one gender, but not by those of the other. For example, a woman who behaves "like a man" -- aggressively and independently -- will frequently be judged to be unpleasant or "bitchy." The more "counter-stereotypic" she is -- i.e., the more aggressive and independent -- the more disproportionately negative the reactions to her will be. *Id.* at 395-96. Yet the same behavior in a man will be perceived as appropriate and, thus, not unpleasant.

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<sup>1/</sup> Even women themselves tend to attribute particular behavior and attributes to other women. See Goldberg, *Are Women Prejudiced Against Women?*, 5 Trans-Action, Apr. 1968, at 28.



Sex-role expectations have a tremendous impact on the work place. Occupations that require assertive, intellectual, energetic behavior are thought to be "masculine," while service occupations are thought to be "feminine." When women pursue "masculine" occupations, they tend to be judged more harshly than men. Nieva & Gutek, *Sex Effects on Evaluation*, 5 *Academy of Management Review* 267, 271-73 (1980); Rosen & Jerdee, *Effect of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions*, 59 *J. of Applied Psychology* 511 (1974). One study, for example, found that people rated the same essay higher if told it was written by a man than if told it was written by a woman, when the essay involved politics, a "male" subject. Paludi & Strayer, *What's in an Author's Name? Differential Evaluations of Performance as a Function of Author's Name*, 12 *Sex Roles* 353 (1985). In addition, women striving for success in some "masculine" fields are confronted with a Catch-22: Women whose behavior conforms to the requirements of the "masculine" jobs are deemed "unfeminine," and therefore inappropriate for advancement. But women whose behavior conforms more closely to the feminine stereotype may be perceived as not assertive enough for the "masculine" job. As a result, women not only are underrepresented in male-dominated occupations, they are channeled into the less lucrative, less responsible, less prestigious jobs within the occupations. Epstein, *Encountering the Male Establishment: Sex Status Limits on Women's Careers in the Professions*, 75 *Am. J. of Sociology* 965, 974 (1970). And this occurs, not on the basis of an accurate assessment of an individual's merits, but on the basis of some preconceived notion of how a person ought to behave based on his or her sex.

Times have clearly changed since three Justices of the Highest Court wrote that "the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother." *Bradwell v. Illinois*, 16 Wall. 130, 21 L.Ed. 442 (1873) (Bradley, J., concurring). The experience of the legal profession is illustrative. Although only 6% of the lawyers were women in 1968, women now comprise 20% of those who are lawyers. *A.B.A. Journal*, June 1, 1988, at 6. Further, 41.5% of the students in law school are women. *Id.* at 50.

But while women have made great strides toward acceptance in the legal profession since the days when they were denied membership in the bar, *Bradwell v. Illinois, supra*, enrollment at law schools,<sup>2/</sup> or employment with law firms,<sup>3/</sup> disparities between the opportunities for female and male lawyers within the legal profession persist. For example, only 8% of partners at large law firms are women, and that figure has risen only 1% since 1982. *A.B.A. Journal*, June 1, 1988 at 70. Moreover, women who are lawyers tend to earn less than male lawyers, even within subgroups. The median income of women associates is 83% that of men associates; of women partners is 68% of men partners; and of women solo practitioners is 53% of men solo practitioners. *Id.* at 72.

<sup>2/</sup> Washington & Lee Law School denied women admittance until 1972. *Trial*, August 8, 1983, at 84.

<sup>3/</sup> It is estimated that as of 1968, only 40 women had worked for Wall Street law firms. C. F. Epstein, *Women in Law* 176 (1981).

Women law professors similarly are disproportionately represented, particularly at the tenure level, and particularly at the more prestigious law schools. 4/ *Id.* at 53.

Mistaken attitudes about women as lawyers also permeate the profession. While overt sex discrimination is now rare, women are subjected to a subtler form of discrimination. In its report to the Chief Judge of the State of New York, The New York Task Force on Women in the Courts found that female lawyers are often treated in an unprofessional manner. *The Report of the New York Task Force on Women in the Courts* (1986).

Of particular importance for this case, the Report found that, whereas aggressive behavior by male attorneys was rewarded or tolerated, it was viewed as inappropriate from female attorneys. *Id.* at 230-32. One woman who was surveyed wrote:

"[I]f a male attorney objects repeatedly during trial he is 'going all out for his client' and is 'a real fighter.' If a female attorney objects similarly, she is a 'bitch' or a 'tough broad.' Do you know one attorney actually came over and tried to kiss me to seal his victory after a hard fought trial?"

Another stated:

"Judges, counsel and court personnel will act more favorable towards women who fit their perceptions of a 'good' woman, good meaning one who acts

4/ During the 1986-87 academic year, five of the 56 tenured positions at Harvard were filled by women; none of the 22 at the University of Chicago, one of the 39 at the University of Michigan, and two of the 36 at Stanford. A.B.A. Journal, June 1, 1988, at 53.

'appropriately,' e.g., feminine, helpless, who defer to the 'better judgment' of men."

Confirming these impressions, a survey reported in the American Bar Association Journal showed that male lawyers perceived that the greatest weakness of female lawyers was that they were "too emotional and *abrasive*." 69 A.B.A. Journal 1383, 1384 (Oct. 1983) (emphasis added).

Inappropriate treatment of women not only offends general notions of dignity and decency, it can also impede the effectiveness of a female attorney advancing her case. It can damage not only the confidence of the attorney, but the confidence of the client in the attorney's abilities as well. *The Report of the New York Task Force on Women in the Courts, supra* p. 8, at 211-12. Inappropriate treatment perpetuates inaccurate perceptions of women, and thereby prevents society from drawing fully on all of its resources.

Advancement to partnership in the professions is particularly susceptible to taint from discriminatory stereotyping, for a number of reasons. First, partnership decisions often involve subjective criteria. Successful professionals possess attributes -- like creativity, energy, ambition, confidence, personability and facility with language -- that are particularly difficult to measure and balance. Moreover, distinguishing between good and superior performance, as is required for advancement decisions about professionals, requires the exercise of subtle judgment by the decisionmakers. Epstein, *supra* p. 6, at 971.

While reliance on subjective criteria within an undefined framework often is necessary for decisions concerning advancement in the professions, and as such is neither improper nor illegal *per se*, see, e.g., *Rogers v. International Paper*



Co., 510 F.2d 1340, 1345 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809 (1975), such reliance poses a danger: subjective criteria are more easily infected by stereotyping than objective criteria. *Id.* Decisionmakers may unlawfully give greater effect to sex-role expectations if they are judging a candidate's personality or general performance than measuring her upper body strength or calculating her score on a civil service test.

In addition, any underlying stereotyping typically goes unstated. Thus even if the ultimate decisionmaker -- or in a partnership, most of the decisionmakers -- is committed to equal opportunity, a tainted evaluation may evade detection and taint the process. Newman, *Remedies for Discrimination in Supervisory and Managerial Jobs*, 13 Harv. C.R. - C.L. L. Rev. 631, 644 (1978).

Further, partnerships (the form of organization adopted by most professional firms) are operated on a collegial basis, so that partners often search for a consensus, rather than commit themselves to governance by majority rule. Such a system empowers a small number of partners to veto a candidate's application, which increases the likelihood that discrimination will taint a partnership decision.

Finally, interaction in partnerships, particularly at the upper level, is often characterized by a "club-like" atmosphere. To maintain this atmosphere, some decisionmakers may choose to select "one of their own," and thereby exclude minorities and women from joining their ranks. Epstein, *supra* p. 6, at 968. As a result of the manner in which partnership decisions are reached, successful Title VII claims involving the professions may depend largely on evidence of subtle discrimination, including stereotyping.

Other factors make claims of discrimination in the professions harder to prove than claims involving lower level jobs. Because those with greater education and worldliness are more knowledgeable about the illegality of sex discrimination, they are less likely to make express sexist comments or provide other direct evidence of discriminatory intent. In addition, fewer people typically are considered for partnership than are considered for advancement in lower level jobs. As a result, the pool of comparison is smaller, making a claim of discrimination harder to prove. Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 998 (1982). This problem is exacerbated by the fact that women and minorities generally have not competed for professional jobs until recently, so that an historical framework is of relatively minor probative value. In light of these limitations, reliance on evidence of decisionmaking tainted by sex-role expectations is often critical to establishing a violation of Title VII.

## II. A Violation of Title VII Occurs if An Employment Decision is Tainted by Evaluations Incorporating Disappointed Sex-Role Assumptions.

Title VII prohibits limitations on employment on the basis of sex. The purpose of Title VII is to eliminate discriminatory barriers to employment, and thereby to ensure equal opportunity of employment for all, regardless of group affiliation. <sup>5/</sup> Title VII does not accord greater rights to women and minorities; it simply ensures that they are judged, as individuals, by the same criteria as others are judged.

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<sup>5/</sup> See H.R. Rep. No. 914, 88th Cong., 1st Sess. 24 (1963).

(Continued)



Although more Title VII claims have been asserted by lower level workers, white collar workers and professionals are also covered by the Act. In 1972, Congress amended Title VII to cover university faculty positions and federal government positions. 6/ At the same time, Congress rejected a proposal to exempt physicians from those protected under the statute. 7/ More recently, this Court held that if parties agree to have a lawyer-employee considered for partnership in a law firm, that agreement is a "term, condition, or privilege" of employment covered by Title VII. *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

As noted above, sex discrimination in the professions tends to take the form not of blatant sexism, but rather of subtle sex-role expectations. This Court, having identified

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reprinted in 1964 U.S. Code Cong. & Ad. News 2391, 2401; see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768 n.28 (1976).

6/ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 103-04 (codified at 42 U.S.C. § 2000e-1 (1976)).

7/ Sen. Javits stated, in opposition to the proposal:

"One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawyers of wood and the drawers of water; that only the blue-collar jobs and ditchdigging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.

....

Yet, this amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion -- just

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a right under Title VII to equal opportunity for professional advancement, is now confronted with determining the most effective means of ensuring that the right is protected.

This Court has recognized that, in passing Title VII, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978); see also *County of Washington v. Gunther*, 452 U.S. 161, 180 (1981). The *Gunther* Court noted, "As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." 452 U.S. at 178 (citing S. Rep. No. 867, 88th Cong., 2d Sess. 12 (1964)). Judging a person more harshly or negatively because she does not behave in a typically feminine way -- that is, because of a stereotype -- is discrimination violative of Title VII. The expectation is inappropriate because it arises by reference to the employee's group affiliation, not by reference to the employee's individual attributes.

Although the district court and the dissenting judge of the court of appeals suggested that this case involves a newform of discrimination, that is definitely not the case. An employment decision using evaluations founded on sex-role

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(Continued)

confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain -- and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them."

118 Cong. Rec. 3802 (1972).

expectations is discrimination with which the courts long have been familiar. This Court has recognized that "[p]ractices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals" and therefore violate Title VII. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978). In *Dothard v. Rawlinson*, 433 U.S. 321, 333-34 & n.17 (1977), the Court noted that the bona fide occupational qualification exception does not apply if the refusal to employ is based on stereotypic assumptions.

Federal courts routinely reject job limitations on the basis of stereotyped expectations. See, e.g., *Fadhl v. City and County of San Francisco*, 741 F.2d 1163 (9th Cir. 1984) (liability may be established where treatment of police officer trainee was the result of bias against women, as evidenced by such comments as "[she is] too much like a woman," and "[she is] very ladylike at all times, which in the future may cause problems"). A woman must be given the opportunity to show she is strong enough to perform a particular job, rather than be denied the job outright on the assumption that most women would be too weak. *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); see also *Vant Hul v. City of Dell Rapids*, 462 F. Supp. 828 (D.S.D. 1978) (defendant's preference for a "big man [who] could handle things" represented sex stereotyping illegal under Title VII). Rather than being rejected for a position, a woman must herself be free to decide whether a job is too dangerous. *Weeks v. Southern Bell Tel. and Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969). A woman must be trusted to choose her own "business clothes," and may not be relegated to wearing a uniform when men in comparable positions may wear business suits. *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1033 (7th Cir. 1979),

*cert. denied*, 445 U.S. 929 (1980). A woman must be permitted to continue her employment as a flight attendant upon becoming a mother if men attendants are permitted to continue their employment upon becoming fathers. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142, 1147 (7th Cir. 1978) ("[A]ssumptions steeped in cultural stereotypes, such as that female parents have a more intense concern for their children than male parents . . . are inconsistent with the purposes of the Act."), *reversed on other grounds sub nom. Zipes v. Trans World Airlines*, 455 U.S. 385 (1982).

Job limitations on the basis of racial stereotypes are also illegal. Title VII is implicated where an interviewer has "a tendency to equate pleasant personality characteristics, and particularly an ability to work well with others, with white people." *Robbins v. White-Wilson Medical Clinic*, 660 F.2d 1064, 1068 (5th Cir. 1981), *vacated and remanded on other grounds*, 456 U.S. 969 (1982). In another instance, a court found that blacks who did not conform to the expectations of their white supervisors were criticized for being too aggressive and too abrasive. *Segar v. Civiletti*, 508 F. Supp. 690, 706 (D.D.C. 1981), *modified on other grounds sub nom. Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

Perhaps the best example of how employment decisions based on disappointed stereotyped expectations constitute discrimination is the case of the "uppity black." Certainly, one who fires a black because he fails to act in a subservient manner would be said to violate Title VII. See 1968-1973 EEOC Dec. No. 70-198 (CCH) ¶ 6087 (1969). Like the black who does not "shuffle," the woman who does not act softly and demurely is protected from limitations on



her employment because of her counter-stereotypic behavior. See *Vuyanich v. Republic Nat'l Bank of Dallas*, 409 F. Supp. 1083, 1089 (N.D. Tex. 1976) (plaintiff dismissed from job states a claim of sex and race discrimination under Title VII where supervisor "told her that she probably did not need a job anyway, because her husband was a Caucasian").

The Equal Employment Opportunity Commission ("EEOC") has concluded that sex stereotyping is illegal under Title VII.<sup>8/</sup> Thus, the EEOC prohibits employment limitations on the ground that a woman but not a man is married, or on the assumption that the turnover rate is higher among women than men. 29 C.F.R. §§ 1604.2(a)(1)(i); 1604.4. Moreover, the EEOC guidelines expressly state that a bona fide occupational qualification may not be based on:

"[t]he refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."

29 C.F.R. § 1604.2(a)(1)(ii).

Thus, denying an applicant a job on the basis of an unsatisfied sex-role expectation, or denying a candidate part-

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<sup>8/</sup> This Court, of course, looks to the guidelines of the EEOC for guidance in interpreting Title VII. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

nership on the basis of an unsatisfied sex-role expectation, is denying a candidate advancement because of her sex in violation of Title VII.<sup>9/</sup>

### III. Evidence of Decisionmaking on the Basis of Disappointed Sex-Role Expectations Established a Violation of Title VII in this Case.

When the evaluation of a woman's behavior is tainted by considerations of how a woman "ought" to behave, she is not being judged on the basis of her individual abilities and has therefore been subjected to discrimination violative of Title VII. The record in this case clearly supports the trial court's finding that the decision of Price Waterhouse to put respondent on the "hold" list in 1982, rather than make her a partner, was discriminatory.

The parties agree that respondent established a prima facie case of sex discrimination. She was manifestly qualified for partnership. Not only was her work of the highest calibre, but she brought more business to the firm than any of the eighty-seven men considered for partnership in her year. Price Waterhouse then articulated its reason for denying Ms. Hopkins' partnership -- she was deemed too aggressive

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<sup>9/</sup> In cases brought under the equal protection clause, this Court likewise has recognized that differential treatment based on role-typing is prohibited. Social welfare programs that are based on the assumption that men and not women are breadwinners are invalid. *Califano v. Westcott*, 443 U.S. 76 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977). Domestic relations legislation embodying the stereotyped expectation that women remain at home has also been struck down. *Orr v. Orr*, 440 U.S. 268 (1979). Similarly, legislation based on the belief that females are more mature than males between the ages of 18 and 21 has been held to violate the equal protection clause. *Stanton v. Stanton*, 421 U.S. 7 (1975).



and too abrasive for elevation. Ample evidence supports the conclusion that these personality traits were viewed negatively because they did not conform to the stereotype of "proper" female behavior.

Respondent presented evidence that her evaluations were colored by comments about her counter-stereotypical behavior. One critic wrote that Ms. Hopkins would benefit from a "course at charm school." A supporter suggested that Ms. Hopkins came across initially as "macho," but "if you get around the personality thing, she's at the top of the list or way above average." In response to the Admissions Committee's investigating Ms. Hopkins' use of profanity, which was regarded by "several . . . partners" as "one of the negatives," a supporter rejoined that such concerns arose only "because she is a lady using foul language."

That these comments are based on sex generalizations seems obvious. Nonetheless, Ms. Hopkins offered the testimony of Dr. Susan Fiske, a social psychologist, to confirm that sexism underlay some of the evaluations. For example, Dr. Fiske noted that the same assertive behavior by Ms. Hopkins was interpreted in a positive way by some evaluators, and in a negative way by others. Moreover, those that evaluated Ms. Hopkins negatively were vehemently negative. Such a strong negative reaction, according to Dr. Fiske, is an indication of a disappointed sex-role expectation. Many of the studies cited at pp. 5-6, *supra*, support Dr. Fiske's testimony.

Petitioner asserts that the evidence presented by Ms. Hopkins fails to establish a causal relationship between the sexist comments and the decision. It suggests, first, that the evidence fails to establish that the process was tainted, in

that the comments do not reflect the views of the ultimate decisionmakers. Such a view disregards the mechanism of the decisionmaking process -- the Price Waterhouse Policy Board relied on the evaluations of the partners who commented about Ms. Hopkins in rendering its decision.

Further, petitioner asserts that evidence of remarks by supporters is irrelevant to the trial court's inquiry. But the fact that in some instances it was supporters who couched their evaluations in terms of Ms. Hopkins' sex does not render the evidence immaterial. Whether made by a supporter or a detractor, the comments made about Ms. Hopkins illustrate an orientation of sex-role generalizations within the workplace. That is shown by the fact that one of the supporters used sex-based language to explain the negative reaction of some of Ms. Hopkins' detractors to her use of profanity. In addition, while one evaluator may have decided that Ms. Hopkins' advantages outweighed a "macho" personality, his notation of the "macho" personality enabled another decisionmaker to balance that factor differently.

Petitioner also trivializes direct evidence that the Policy Board's conclusion was substantially influenced by sex stereotyping. In deciding to put Ms. Hopkins' name on the "hold" list, the Policy Board noted that, although she had "a lot of talent," she needed "social grace." And Thomas Beyer, who was found by the district court to have been entrusted with explaining the Policy Board's decision to Ms. Hopkins, advised her "to walk more femininely, talk more femininely, dress more femininely, wear make up, have her hair styled, and wear jewelry," if she hoped to become a partner the following year. It is hard to imagine stronger evidence that the decision to deny respondent an otherwise deserved partner-

ship was tainted by impermissible expectations on the basis of sex. 10/

The record also reflects that Price Waterhouse's decisionmaking process was susceptible of discriminatory taint, 11/ and that such taint in fact infected the process as applied to Ms. Hopkins. The Price Waterhouse procedures relied heavily on written evaluations of subjective criteria, unguided by any standards. As discussed above, such a system risks taint from discriminatory decisionmaking. Further, the firm's procedure gave powerful effect to short-form evaluations submitted by partners who had limited contact with a candidate, and hence less opportunity for her to counter the negative reaction engendered by disappointed sex-role expectations by force of her performance. Because Price Waterhouse, like many firms, operated by consensus, this type of form would increase the danger that tainted evaluations would prevent certain candidates from being advanced to partnership. Moreover, the difficulty of ensuring equal opportunity

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<sup>10/</sup> Petitioner's suggestion that Beyer's comments were simply his own well-intentioned ideas about how respondent could succeed the following year, rather than evidence of what factors underlay the decision (Pet. Br. at 15, n.3), is, ironically, further evidence that sex stereotyping still persists at Price Waterhouse. It reflects the well-documented phenomenon that stereotyping is rooted in paternalism and hence is perceived as benign. (*See supra*, p. 5.)

<sup>11/</sup> Because the parties will familiarize the Court fully with the Price Waterhouse procedures, the Association will dispense with a description here, and will proceed to a discussion of its relevant features.

for women is increased where men evaluate women in a traditionally male profession and a male working environment. 12/

This record amply supports the conclusion that the denial of partnership to Ms. Hopkins was impermissibly infected by sex stereotyping. Petitioner's brief, raising novel issues of law, is simply camouflage to confuse a rather straightforward claim. By concerning itself with mixed motive analysis, petitioner sidesteps the abundant evidence demonstrating that the decisionmaking process with regard to Ms. Hopkins was impermissibly tainted by disappointed sex-role expectations.

### CONCLUSION

For the reasons stated above, the Association, through its Committees on Civil Rights, Labor and Employment Law, and Sex and Law, urges this Court to affirm the decision of the Court of Appeals for the District of Columbia Circuit.

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<sup>12/</sup> At trial, Ms. Hopkins presented testimony from Dr. Fiske to demonstrate the risks of taint within the Price Waterhouse decisionmaking process. While the social psychologist did not add to the foundation of the plaintiff's case, she helped interpret it. She pointed out, for example, that short forms exacerbated underlying sex stereotyping, and that where men evaluated women for a "male" job, tainting is more likely to occur.

Respectfully submitted,

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No. 87-1167

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

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PRICE WATERHOUSE,  
*Petitioner,*  
v.

ANN B. HOPKINS,  
*Respondent.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

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**BRIEF FOR THE AMERICAN FEDERATION OF  
LABOR AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS AS *AMICUS CURIAE*  
IN SUPPORT OF RESPONDENT**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

No. 87-1167

PRICE WATERHOUSE,  
v. *Petitioner,*  
ANN B. HOPKINS,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

**BRIEF FOR THE AMERICAN FEDERATION OF  
LABOR AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENT**

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 90 national and international labor organizations having a total membership of approximately 13,000,000 working men and women, with the consent of the parties as provided for in this Court's rules.

**SUMMARY OF ARGUMENT**

This proceeding, contrary to Price Waterhouse's contention, is a relatively straightforward mixed motive case under Title VII of the Civil Rights Act of 1964, 432 U.S.C. § 2000e et seq.: the district court's findings, reviewed and approved by the court of appeals, establish

that sex-based considerations were given significant, negative weight in the promotion review process which led to denying plaintiff a partnership.

The issue directly before this Court concerns the placement and the nature of the burden of proof on the question whether the disadvantage the plaintiff suffered in the promotion evaluation process in the end made a difference in producing the decision to deny her a partnership. As Price Waterhouse recognizes, however, it facilitates analysis first to delineate the necessary components of a Title VII cause of action.

1. The language and structure of both of the principal substantive sections of Title VII, §§ 703(a)(1) & (2), as interpreted in this Court's cases, convincingly support the conclusion that an employee evaluation system biased against women violates Title VII without regard to the precise impact of that bias on each particular decision. The "because of . . . sex" language in those sections of the statute does not indicate otherwise; that language is best read as requiring that a discriminatory consideration be a basis for the challenged employment practice; when that practice is a decision-making process that weighs gender as a negative consideration, the requisite motivational element is self-evident.

2. This construction of Title VII comports with and is essential to further the statute's basic policies. Title VII's high purpose is to assure that discriminatory factors do not play a role in the distribution of benefits and privileges in the workplace. It is self evident that permitting employers to incorporate sex-based factors in their decisionmaking process as long as no determinative impact on any particular employment decision can be proven frustrates that purpose.

3. This Court's cases in analogous areas support the conclusion that a cause of action for violation of a rule requiring a fair and even-handed decision-making process

can be made out without demonstrating that the tainted aspect of the process in fact accounted for the negative decision. Where such causes of action are recognized, the issue of the connection between the impermissible aspect of the process and the result becomes a problem at the relief but not the liability stage; once liability for an illegal decision-making process is established, the burden of proof as to whether the same result would have occurred through a proper system is placed on the defendant.

4. Nothing in contemporary tort law regarding causation detracts from the foregoing analysis. Rather, modern tort doctrine in large part parallels that analysis, by recognizing liability whenever culpable conduct is a "substantial factor" in bringing about the harm protected against, by focussing on policy questions in defining that harm and the requisite causal connection to the culpable conduct, and by shifting to the defendant the burden of proof as to causation when it is unfair, on policy grounds, to place that burden upon innocent plaintiffs.

5. Once it is established that an employer commits a Title VII violation by following a biased decision-making process, the conclusion that the burden falls upon the employer to avoid make whole relief in a particular case by proving that there was no economic injury traceable to its illegal act follows *a fortiori*. As the party that created both the risk that a discriminatory factor would be determinative and the risk that the precise impact of such a mental factor would be very difficult to reconstruct after the fact, it is appropriate, as this Court has held in analogous cases, to place the risk of an error in the judicial fact-finding process upon the wrongdoer. Moreover, while this Court has not previously explicitly so held, as a practical matter decision-makers have recognized that given the hypothetical and psychological nature of the issue at the relief stage, it is appropriate to insist that the employer meet its affirmative burden through



objective, reliable kinds of evidence, and to require as well that the likelihood that the illicit factor affected the result be very small. A "clear and convincing" evidence standard captures and succinctly states those requirements.

## ARGUMENT

### Introduction

(a) The defendant Price-Waterhouse, an accounting firm, has a collegial decision-making system for admitting employees to the partnership. The district court found that this system gave substantial weight to "comments influenced by sexual stereotypes" and in that way "inject[ed] stereotyped assumptions about women into the selection process." Pet. App. 57a, 58a. That court concluded that "the Policy Board's decision not to admit the plaintiff to partnership was tainted by discriminatory evaluations;" the employer's decision was the "direct result" of "the maintenance of a system that gave weight to such biased criticisms" and "that made evaluations based on 'outmoded attitudes' determinative." Pet. App. 56a, 58a-59a.

Price Waterhouse argues that the district court's findings are insufficient to demonstrate that sex-based considerations played any role at all in the decisional process that produced the promotion decision adverse to the plaintiff. According to the employer "the only evidence of 'mixed motives' was the presence of an intuitively divined element of sexual stereotyping in the atmosphere." Pet. Br. at 43.

The district court's conclusion that the decision at issue here was infected by sexual stereotyping was not "intuitively divined", but was based instead on consideration of the evidence before that court. The court of appeals reviewed at length (Pet. App. 10a-17a) the evidence supporting that conclusion, noting that the district court's finding was based upon not only the expert evidence on

sex stereotyping but also upon the comments made about the plaintiff herself and about other women candidates for partnership as part of the evaluation system. Based upon that review, the court of appeals concluded that the district court's finding in this regard was not "clearly erroneous", since "there is ample support in the record for the District Court's finding that the partnership selection process at Price Waterhouse was impermissibly infected by stereotypical attitudes towards female candidates." Pet. App. 12a, 17a. The court of appeals therefore performed properly its task of reviewing the district court's factual findings in this regard. *Anderson v. City of Bessemer*, 470 U.S. 564 (1985); *Pullman Standard v. Swint*, 456 U.S. 273 (1982).<sup>1</sup>

The district court found, moreover, that sex stereotyping was not simply "in the atmosphere" but *in Price Waterhouse's promotion system*, and that this stereotyping had a "direct" impact on the negative evaluation of the plaintiff for partnership. Again, the court of appeals reviewed this finding carefully (Pet. App. 20a), and concluded that while the plaintiff "has not demonstrated the exact impact that stereotyped comments had on the Board's ultimate decision", there was "ample support for [the district court's] conclusion that stereotyping played a significant role in blocking plaintiff's admission to the partnership." Pet. App. 20a (emphasis supplied). Whether the court of appeals was correct in this regard or not presents, once again, only a question of the adequacy of the court of appeal's review of the district court's fact findings. And, once again, it appears that the court

<sup>1</sup> While we address the point we note that the propriety of the court of appeals' review of the district court's factual findings is a question not fairly encompassed within the question presented for review (Pet. Br. I), and one with which this Court in any event rarely concerns itself. *Graver Tank & Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, 347 (1986).



of appeals proceeded properly with respect to this factual review issue.

(b) Thus, despite Price Waterhouse's protestations to the contrary (Pet. Br. at 42-50), as the court of appeals recognized this is "a case of mixed motivation [because] . . . [t]he District Court simply found that *both* plaintiff's personality and the sexually stereotyped reactions to her personality were significant factors in the firm's decision to hold her candidacy." Pet. App. 25a (emphasis supplied). As the proceeding comes to this Court, the critical finding of the district court, affirmed by the court of appeals, is that because of her sex, plaintiff was evaluated less favorably than she would have been on the basis of her personality standing alone.

That being so, the point of controversy here concerns whether the less-favorable-evaluation-on-the-basis-of-sex component of Price Waterhouse's decision-making process was sufficient to make the difference between a partnership offer and the "hold" that actually occurred. Indeed, the parties have focussed on where the burden of persuasion lies with respect to that point and the nature of that burden.

However, as Price Waterhouse recognizes (Pet. Br. at 21), in order to resolve that controversy, it is necessary first to determine the basic parameters of a viable Title VII cause of action. In order to know who has what burden of persuasion here one first has to know whether a showing that an employer maintains a selection process that in some respect is biased against women, and subjects women to that process, makes out a violation of Title VII. Price Waterhouse argues that such a showing is not sufficient; according to the employer, Title VII focusses only upon the employment decision ultimately made, and does not concern itself with the fairness of the process through which that decision is made. Pet. Br. at 20-27. This contention is simply incorrect. And not surprisingly Price Waterhouse's proposed answer to the analytically separate

question as to the relevance of proof that any sex differentiation in the evaluation process did not cause the plaintiff any economic loss—which rests on the employer's false premise—is incorrect as well.

(c) As we understand Price Waterhouse's position, the employer would agree that the plaintiff has made out a Title VII case where an illegitimate consideration is one of several reasons for an employment decision *as long as that reason was determinative*, either independently or in combination with other, legitimate reasons.

Thus, for example, if an employer were considering three employees for discharge due to economic conditions—a woman who was a fully competent employee, a woman who was not a fully competent employee, and a man who was the least competent employee of the three—and discharged the less competent of the two women, Price Waterhouse would agree that a finder of fact could infer that the employer had "mixed motives"; the employer did not regard being a woman alone as sufficient for discharge, but the employer did treat being a woman as a negative consideration in the evaluation process. Since it is clear that it was "because of" that negative consideration—her gender—(although also because of her lack of competence) that the less competent of two women was discharged, Price Waterhouse would recognize that Title VII had been violated. *Cf. Phillips v. Martin Marietta Co.*, 400 U.S. 542 (1971) (*per curiam*).<sup>2</sup>

<sup>2</sup> In light of the argument made by Price Waterhouse with regard to the burden of persuasion issue presented here (Pet. Br. at 29-36), it is important to note that the situation delineated by this example is quite separate from one in which the claim that there is a nondiscriminatory reason for the discharge (or for any other employment decision) is pretextual.

A pretextual explanation is, as this Court has explained, one which is "a coverup". *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973). See also, *Webster's New World Dictionary* 1127

This case (like most mixed motive cases) presents a more complex variant of the hypothetical situation just discussed. In this case the district court found that Price Waterhouse has set up an evaluation system which considers not two considerations but many in deciding upon promotions; that gender is included in that set of considerations as a negative factor of "significant" weight; and that since the system is a qualitative one leaving ample room for informed discretion, it is not possible to quantify the effect of gender in any particular situation. And contrary to our hypothetical, in a case like this it is not possible to determine the precise impact of the gender consideration simply by comparing otherwise similarly situated individuals; the pertinent considerations are too complex, as indicated by the district court's conclusion that the plaintiff had not identified any men sufficiently similar to her in all pertinent respects to serve as an ap-

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(2d College Ed.) (defining "pretext" as "a false reason or motive put forth to hide the real one, excuse" and as a "coverup; front"). The concept of "pretext" thus concerns an alleged dissonance between an employer's explanation of his motives and his motives in fact.

In a mixed motive situation, the nondiscriminatory motive may be pretextual or not, depending upon whether the employer also acknowledges the illegitimate, discriminatory motive. If, in the above example, the employer insisted that his only criteria for discharge was incompetence, that would be a pretextual explanation, since an incompetent man was retained. If, on the other hand, the employer acknowledged his true mixed motives, there would be no pretext. The employer would, however, be liable, even on Price Waterhouse's theory in this case, although the nondiscriminatory motive was not pretextual and was itself another determinative reason in making the discharge decision.

In short, the problems of pretext and of mixed motivation have little to do with each other. Cases dealing with pretext (*e.g.*, *McDonnell Douglas, supra*, and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)) concern the determination of what the employer's motivation really was, while the mixed motive problem arises only once that determination is made and concerns the propriety of liability and of relief once the facts are established.

propriate test of the impact of gender upon the promotion decision. Pet. App. 49a.

It is nonetheless true that, in this case as in our hypothetical, the employer treated gender as a negative consideration in the process of making an employment decision, and in that sense based its evaluation upon an illegitimate consideration.<sup>3</sup> And it is also undeniable that the employer by doing so has created a situation in which there is a *significant risk* that discriminatory considerations will in fact be determinative in particular situations, a risk that would be absent if only legitimate factors were considered in making promotion decisions.

Price Waterhouse's fundamental position in this case proceeds from the premise that an employer is free to employ such a tainted decisionmaking system, and is not open to a Title VII suit by a woman (or a group of women) subject to the system to enjoin its operation on the ground that the system as such violates Title VII. Pet. Br. at 27-28. According to the employer, only if the sex-based consideration embedded in the decisionmaking process were proven by the plaintiff in a particular case to have played a "decisive role" in a specific employment decision with adverse economic consequences would Title

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<sup>3</sup> Again, a hypothetical example may clarify this point. Price Waterhouse might have instituted a more formal evaluation system, providing for point rankings of the various candidates, based upon different point values for different relevant qualities. If the employer assigned a number of negative points for being a woman, the impact would be basically the same as the sex stereotyping in this case; the only difference would be that the impact would be precisely measurable, because the entire system would be based on quantifying considerations. Cf. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 262 n.7 (1979); *Regents of University of California v. Bakke*, 438 U.S. 265, 267-77 (1978). In that hypothetical, as in this case, gender would be a negative, although not necessarily a determinative, factor in every evaluation of a woman, and the employer would be basing its evaluation upon both legitimate and illegitimate factors.



VII be violated. Pet. Br. at 29; *see also id.* at 23; Brief of the United States as Amicus Curiae (Gov. Br.) at 9-10. There is no basis for this position under Title VII, as we now show.

### I. Title VII's Language

Section 703(a)(1) of the Act, 42 U.S.C. 2000e-2(a)(1), forbids "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin." As this Court recently held,

The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment.' *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978). [*Meritor Savings Bank v. Vinson*, — U.S. —, 106 S. Ct. 2399, 2405 (1986).]

Just as "a hostile or offensive environment for members of one sex is [an illegal] arbitrary barrier to sexual equality" and therefore an illegal "condition of employment" (*Meritor Savings Bank v. Vinson*, 106 S. Ct. at 2406, *quoting Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)), so the requirement that an employee submit to a decisionmaking process that treats men and women disparately on the basis of their gender and subjects women but not men to an added risk of an adverse outcome is, in and of itself, an unlawful condition of employment.<sup>4</sup>

<sup>4</sup> That the statute proscribes "discriminating . . . with respect to" employment reinforces the conclusion that Congress intended to reach not simply the end-result of decisionmaking processes but those processes themselves. Creating a promotion system that is less favorable to women assuredly discriminates against women "with respect to" promotion, even if it is not possible to trace any particular promotion decision to the sex-based aspect of the promotion evaluation process.

Even more clearly, the other pertinent substantive section of Title VII, § 703(a)(2), 42 U.S.C. § 2000e-(2)(a)(2), reaches employment decisionmaking that relies upon a sex-based factor as a negative consideration. That section makes it unlawful for employers to

limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, race, or national origin.

Quite evidently, § 703(a)(2) in terms proscribes decision-making processes that disadvantage women by placing a negative weight on femaleness. Such a process, as we have already seen, "tends to deprive [women] of employment opportunities . . . because of sex" by creating a higher risk for women than for men that employment opportunities will be denied. As this Court stated so emphatically in one of its earliest Title VII cases:

The objective of Congress in the enactment of [this section of] Title VII is plain from the language of the statute. . . . It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of [male] employees. . . . What is required by Congress is the removal of artificial barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications. [*Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).]

It is because Congress was concerned not simply with the end-result of employment decisions but also with *purging the employment decisionmaking process of sex-based and (race-based) considerations* that "[t]he statute speaks not in terms of jobs and promotions, but in terms of *limitations and classifications* that would deprive any in-



dividual of employment opportunities." *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (emphasis in original).<sup>5</sup>

In addition, § 703(a)(2) proscribes practices that do not adversely affect any particular employment opportunity, but that do "adversely affect [a women's] . . . status as an employee." To apply an evaluation process that gives weight to sex stereotypes adversely affects a woman's status in the workplace simply by giving credence to those negative stereotypes, much as maintaining race-segregated bathrooms in a workplace would do. In this instance, as in many others, the evaluation process resulted not only in a decision—to place the plaintiff on "hold" with respect to partnership—but also in written and oral statements regarding the plaintiff's strengths and weaknesses as an employee. Sex-stereotyping statements "adversely affect [a women's] status as an employee" even when the decision is favorable—and assuredly do so when the decision is unfavorable—by conveying to fellow employees and to managers a gender-tainted view of the individual's worth as an employee.

The foregoing reading of §§ 703(a)(1) & (2) is not altered in any way by the fact that Title VII provides that, to act unlawfully an employer must act "because of such individual's . . . sex." That phrase does not require that a sex-based (or race-based) consideration "cause" an adverse employment decision in the same sense

<sup>5</sup> *Griggs v. Duke Power Co.*, *supra*, and *Connecticut v. Teal*, *supra*, were both disparate impact cases. But it is plain that Congress in enacting Title VII was equally interested in rooting out barriers to equal opportunity that are not directly sex-based but have a disparate impact upon members of one gender and decision-making processes that place women at a disadvantage on directly gender-based grounds. Put another way, if the tests at issue in *Griggs* and *Teal* had deducted five points from the grade of every woman, there would have been no dispute, we suspect, as to whether those tests were invalid as tending to deprive women of employment opportunities; only because there was no such explicit link to a proscribed classification was there a cognizable argument on the employer's side.

that a physical act "causes" a physical injury. As a literal matter, and as a matter of human psychology, an employer who takes action that is in part premised upon a sex-based consideration and in part premised also upon a legitimate consideration, has acted "because of . . . sex" (although because of other reasons as well). The employer's action is "on the basis of" and "takes into account" sex as a factor that has been accorded some weight in reaching the decision to act. Given the limits on our knowledge of the wellsprings of human action it is difficult—if not impossible—to give more content to the concept of a discriminatory motive.

In sum, the statutory words demonstrate that "it would be unlawful for defendant to put [an employee] at a disadvantage in the competition for promotion because of [sex], as well as to actually deny . . . the promotion for this reason." *Bibbs v. Block*, 778 F.2d 1318, 1321 (8th Cir. 1985).<sup>6</sup> Under this approach, because the unlawful employment practice is the flawed decisionmaking process itself and not simply its particular results, any causal requirement runs between the unlawful motivation and the process, and not between the unlawful motivation and the *ultimate decision*.<sup>7</sup> And that link is in mixed motive

<sup>6</sup> See *id.* at 1323 for a list of federal court of appeals cases adopting basically this same analysis of the substantive reach of Title VII. See also, for a commentary that many of those cases found persuasive on this question as well as on the others in this case, Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action*, 82 Columbia L. Rev. 292 (1982).

<sup>7</sup> So, for example, "if an employer requires black employees to meet a higher standard [than whites to get promoted], the statute is violated even if [the blacks] actually meet [the higher standard] and get the jobs in question." *Bibbs v. Block*, 778 F.2d at 1321-22; see also, e.g., *King v. Trans-World Airlines, Inc.*, 738 F.2d 255, 259 (8th Cir. 1984) (an interview process that asks women questions not asked of men violates Title VII even if the defendant has legitimate reasons for not hiring the plaintiff).

It is worth noting as well that in cases like this one, causation in the sense we use that term in regard to physical acts is ordinarily

cases almost always self-evident, since the discriminatory evaluation process is by definition one made discriminatory by the very fact that the employer *took or is taking sex-based considerations into account and is giving those considerations a negative weight in its decisionmaking*. It is therefore simply untrue that the foregoing reading of Title VII "make[s] illegal the existence of discriminatory thoughts and expressions," "prohibit[s] discrimination 'in the air'", or "impose[s] liability for discriminatory animus without more". Pet. Br. at 21; Gov. Br. at 9.<sup>8</sup>

## II. Title VII's Policies

Title VII's basic purpose is not simply to compensate individuals for economic losses due to proscribed discrimination, but "to eliminate . . . discrimination in employment based on [the proscribed factors]." H. R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963). For this reason, the concept of illegal discrimination incorporated in the Act seeks to end *any* use of the proscribed consideration factors in making employment decisions. As one of the floor managers of the bill explained:

To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions in treatment or favor which are prohibited by

not in dispute. For example, on the facts in this case as found by the district court, the employer's conduct certainly caused Hopkins to be subjected to a discriminatory promotion evaluation system, and to be rejected for partnership pursuant to that system. The question is not *whether* the defendant caused Hopkins injury, but why, *viz.*, with a motive forbidden by the statute, or with a legal motive.

<sup>8</sup> For the reasons stated in the text, it is also plain that the legislative history quoted in support of the proposition that Title VII does require a causal connection between an unlawful motive and a proscribed employment practice (Pet. Br. at 24-26; Gov. Br. at 8-10) does not advance the inquiry. For we too recognize the need for a causal link; the dispute is over the nature of that link, and the quoted congressional statements do not speak to that dispute.

section [703] are those which are based on any . . . of the forbidden criteria: race, color, religion, sex, and national origin. . . . The bill simply eliminates consideration of color [and other proscribed criteria] from the decision to hire or promote. [110 Cong. Rec. 7213, 7218 (1964) (remarks of Senator Clark). See also, e.g., 110 Cong. Rec. 13088 (1964) (remarks of Senator Humphrey).]

Consistent with this legislative history, this Court has repeatedly stressed that:

the primary objective [of Title VII] was a prophylactic one . . . [to] 'provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history. [*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).]

See also *Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 429-30; *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 93 (1981); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 595 (1981); *Teamsters v. United States*, *supra*, 431 U.S. at 324, 357-364.

The reading of Title VII we suggest forwards the fundamental "prophylactic" purpose of the statute: employment decisionmaking free of the proscribed discriminatory considerations. In contrast, on Price Waterhouse's view of the statute, employers are free to violate that norm with impunity in a large number of instances, becoming liable even for injunctive and declaratory relief only where the plaintiff succeeds in demonstrating that a proscribed discriminatory consideration was determinative (although not necessarily solely determinative) in a particular employment decision. Such an approach, far from encouraging employers to "self-examine and self-evaluate their employment practices" (*Albemarle Paper Co. v. Moody*, *supra*, 422 U.S. at 417), encourages continuation of the more subtle forms of employment discrimination.



Indeed, the result of such tainted decisionmaking processes is twofold: First, women and minorities are discouraged in pursuing career opportunities, simply by reason of being treated disparately from, and more harshly than, their fellow workers. And second, there are certain to be numerous instances in which the proscribed discriminatory consideration embedded in the decision-making process was in fact determinative, but in which the difficulty of reconstructing the employer's decision-making process with sufficient precision to prove that impact proves insurmountable. It is undoubtedly for these very reasons that Congress in enacting Title VII created a cause of action for gender-biased decisionmaking on employment matters.<sup>9</sup>

### III. Analogous Cases In This Court

The reading of Title VII suggested above is further buttressed by this Court's approach in cases arising under the Constitution, and under the National Labor Relations Act.

This Court has recognized first of all that the claim that a decisionmaking process does not meet applicable constitutional standards is sufficient to state a cause of action, and that questions relating to the connection between that flawed process and the decision actually made are matters that go to remedy, not liability.

<sup>9</sup> In this case, the district court found that sex stereotyping was not simply "a" factor in Price Waterhouse's decisionmaking process but a "significant" factor in that process. Pet. App. 25a. It is thus not necessary in order to affirm the decision below for this Court to decide whether *any* reliance on gender-based decisionmaking creates liability under Title VII, or whether there is room for a *de minimis* rule.

We hasten to add that it is common ground that it is *not* sufficient to demonstrate simply that one or more of the individuals in a decisionmaking capacity harbors discriminatory views; some factual basis for inferring that those views were given operative weight with regard to an employment decision is necessary.

For example, in *Carey v. Piphus*, 435 U.S. 247 (1978), while "[t]he District Court held that . . . [plaintiffs] had been suspended without procedural due process," there was no finding as to whether the plaintiffs would have been suspended if procedural due process had been accorded. *Id.* at 251-53. The Court, proceeding on the premise that liability had been established, approved a lower court ruling that "if [the defendants] can prove on remand that [the plaintiffs] would have been suspended even if a proper hearing had been held," then no damages for injuries caused by the suspension would be available. *Id.* at 260.<sup>10</sup> The Court added, however, that "persons in [plaintiff's] position might well recover damages for mental and emotional distress caused by the denial of procedural due process" (*id.* at 262), and held that because "the fact remains that [plaintiffs] were deprived of their right to procedural due process," nominal damages are available even if no actual damages could be proven (*id.* at 266-67).<sup>11</sup> See also *Memphis Community School District v. Stachura*, — U.S. —, 106 S. Ct. 2537 (1986) (*Carey* principles apply to employment decisions impermissibly taking into account First Amendment activity). Cf. *LeBoeuf v. Ramsey*, 503 F. Supp. 747 (D. Mass. 1980).

Similarly, in *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977), the Court, after recognizing that a school teacher was discharged in part because of his "communication [to a radio station] protected by the

<sup>10</sup> The lower courts had granted injunctive and declaratory relief (*id.* at 252); it is permissible to grant such relief, of course, only after liability has been established.

<sup>11</sup> The *Carey* Court identified the interests served by the constitutional due process requirement to be somewhat similar to those discussed above with regard to a Title VII violation for gender-tainted decisionmaking: "to convey to the individual a feeling that the government [in this instance, the employer] has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Id.* at 262.



First and Fourteenth Amendments," (*id.* at 284), indicated that it was sufficient to establish a constitutional violation for the plaintiff to demonstrate that the communication "was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision," (*id.* at 286-287).<sup>12</sup> The Court then turned to the separate remedial question of whether "Doyle is entitled to reinstatement with backpay;" *viz.*, to the question of whether there was a "constitutional violation justifying remedial action." *Id.* at 284, 285; emphasis added. And the Court concluded that the normal reinstatement with backpay remedy would not follow from the constitutional liability if—and only if—the defendant demonstrated that the unconstitutional decisionmaking process was not responsible for plaintiff's loss of his job; *viz.*, that the plaintiff would have been discharged in any

<sup>12</sup> The *Mt. Healthy* Court did not spell out the underlying reasons for describing the elements of the constitutional cause of action in this way. However, a few years before, in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), this Court had explained the relationship between the First Amendment and public employee discharges for free speech:

[E]ven though a person has no 'right' to a valuable government benefit for any number of reasons, there are some reasons upon which the government may not rely. . . . For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

The essence of the constitutional violation alleged in *Mt. Healthy* was that the School Board has acted upon one of those "reasons upon which the government may not rely." Once this was proven, under *Perry* the plaintiff had established a constitutional wrong. See also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977) (decided the same day as *Mt. Healthy*) (because "racial discrimination is not just another competing consideration", "proof that a discriminatory purpose has been a motivating factor in the decision" is sufficient "proof of racially discriminatory intent or purpose" to show "a violation of the Equal Protection Clause.")

event. *Id.* at 287.<sup>13</sup> See also *Givhan v. Western Line Consolidated School District*, 439 U.S. 694, 416 (1979) (referring to the *Mt. Healthy* burden-shifting rule as dealing only with the question when "a public employee must be reinstated"); *Regents of the University of California v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (Opinion of Powell, J.).

This Court has in addition approved a similar approach under the National Labor Relations Act. *NLRB v. Transportation Management Co.*, 462 U.S. 393 (1983), reviewed an NLRB construction of § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), the section proscribing "discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." Under § 8(a)(3) as construed by the NLRB and approved by this Court, "to establish an unfair labor practice the General Counsel need show by a preponderance of the evidence only that a discharge is in any way motivated by a desire to frustrate union activity." 462 U.S. at 398-99. An unfair labor practice is established if the employer in its decisionmaking process gives negative weight to the consideration that an individual is a union adherent. The Board then permits the employer to establish as an "affirmative defense"—*viz.*, as a basis for avoiding liability based upon a consideration other than failure to prove the cause of action (C.A. Wright & A.R. Miller, *Federal Practice and Procedure: Civil* § 1270 at 289-92 and § 1271 at 313-16)—that the employer would have taken the same action absent the illegal motivation, and thereby to avoid a coercive order.

While permitting this "affirmative defense"—burden shifting approach, the Court made clear that the burden

<sup>13</sup> Of course, as *Memphis Community School District v. Stachura* *supra*, was later to confirm, even if there were no reinstatement or back pay available, nominal and, where appropriate, actual compensatory damages for the constitutional violation would still lie.

shifts to the employer only *after* all the elements of an unfair labor practice—*viz.*, after the factors necessary to establish that “[t]he employer is a wrongdoer”—have been made out. 462 U.S. at 401-02. And the Court approved this approach as a permissible variant upon an alternative the Board was also free to adopt; *viz.*, the alternative of providing some relief, but not reinstatement and backpay, where the unfair labor practice was proven but the employer could demonstrate that the charging party was not economically injured thereby. *Id.* at 402.<sup>14</sup>

#### IV. The Common Law of Causation

Contrary to the argument pressed by the United States (Gov. Br. at 10-16), the construction of Title VII we advocate is in no way at odds with modern concepts of

<sup>14</sup> The Board, of course, has wide discretion in determining what remedies, if any, to provide once an unfair labor practice has been adjudicated. See *NLRB v. Food Store Employees Local 347 (Heck's, Inc.)*, 417 U.S. 1, 8 (1974). In approving the “affirmative defense” approach as an alternative to providing at least some remedy for an adjudicated unfair labor practice, the Court in *Transportation Management* did not deal with the matter *de novo* but rather recognized the wide berth the NLRB is accorded in the area of remedying unfair labor practices.

It was our view, when *Transportation Management* was decided (see Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in *Transportation Management*, at 12-21) and remains our view, that to refuse to provide at least prospective relief once it has been determined that an employer “is a wrongdoer” under the NLRA does not forward that statute’s purposes.

Under Title VII, unlike the NLRA, the Court is not reviewing an administrative agency’s construction of a statute but is construing an enactment in the first instance. In this circumstance there are no deference considerations that preclude adoption of a construction which most completely forwards the statute’s purposes. For the reasons discussed previously in the text, with regard to Title VII that construction is one that views liability as established, and appropriate relief available, on a showing that a proscribed consideration was taken into account in the decisionmaking process.

causation in tort law.<sup>15</sup> Rather, it is now quite widely accepted: (a) that approaches to causation which depend upon answering hypothetical factual questions are to be avoided in favor of analyses that view what actually happened and ask only whether the defendant’s conduct was a “substantial factor” in bringing about the injury; (b) that causation-in-fact issues cannot be determined in a policy vacuum, but must be considered with an eye toward the purposes of the substantive norm at issue, and particularly toward whether that norm was intended to avoid the *risk* of inflicting injury as well as to avoid the infliction of actual injury; and (c) that for various policy-related reasons it may be appropriate to transfer the burden of proving traditional but-for causation from the plaintiff to the defendant.

(a) While the United States derives its “sufficient cause” concept from a few fairly recent tort law commentaries, that concept is in fact both narrower and differently focussed than the concept most commonly accepted today.<sup>16</sup> Thus, the most widely read text on torts recognizes (albeit grudgingly) that

<sup>15</sup> The discussion of causation concepts in the brief for the United States is excellent and accurate as far as it goes. We therefore take that discussion as a departure point and show in the text that the “sufficient cause” concept the government suggests is much narrower than the causation concepts current in tort law today.

One point bears noting in this regard: It is far from clear that tort law causation concepts are an appropriate analogy in the present context. And, in fact, in developing the law in the other substantive areas that turn upon the motive with which an employer or government took detrimental action, this Court has not generally reasoned on the basis of common law tort causation concepts. In the end, we believe reasoning of the kind presented heretofore in this brief, based upon the particular statutory scheme and taking into account the particular role of human motivation in decisionmaking, is more pertinent than common law ideas of causation.

<sup>16</sup> The suggestion at one point in the United States’ brief that the “sufficient” cause concept is the one applied by this Court in



a broader rule [than the "but for" rule] . . . has found general acceptance. The defendant's conduct is a cause of the event if it was a material and substantial element in bringing it about. . . . It has been considered that "substantial factor" is a phrase sufficiently intelligible to furnish an adequate guide . . . and that it is neither possible nor desirable to reduce it to any lower terms. [W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on The Law of Torts* 267 (5th Ed. 1984)].<sup>17</sup>

*Mt. Healthy and Transportation Management* (Gov. Br. at 21) is mistaken.

In the first place, in those cases the Court concerned itself with describing the constitutional or statutory violation in terms of what *actually* motivated the employer; that, presumably, is why the term "motivating factor" was used in both cases, to describe a factor that was in fact one of the actor's motives. The government's analysis, in contrast, requires determination of hypothetical issues concerning whether a legitimate motive would have been "sufficient" to cause the injury in question had the illicit motive not played a role in the decision.

Moreover, nothing in *Mt. Healthy* or *Transportation Management* (or any other of this Court's relevant cases) purport to set a threshold that excludes from the liability determination factors that, in this case, were "significant" in the decisionmaking process, but may have been neither necessary nor sufficient to the decision standing alone. Rather, as we have demonstrated, a constitutional violation on the one hand, or an unfair labor practice on the other, can be made out simply by showing that an impermissible motive played a significant role in the decisionmaking process; necessity or sufficiency becomes relevant at the remedy stage, if at all.

<sup>17</sup> See, for the seminal articles from which this now-dominant approach was derived, Malone, *Ruminations on Cause-in-Fact*, 9 Stan. L. Rev. 60 (1956); Green, *The Casual Relation Issue*, 60 Mich. L. Rev. 543 (1962).

Malone, for example, argues at some length that there is no judicial support for the proposition that the "substantial factor" test should be limited to situations in which "the force set in motion by the defendant would have been sufficient to produce the damage alone". Malone, 9 Stan. L. Rev. at 90-91:

It is difficult to appreciate how the limitation in question serves any purpose of administration or policy. . . . [For ex-

This approach avoids—and in large measure is deemed superior to the alternatives on the ground of avoiding—the hypothetical, counter-to-fact nature of the "but for" and "sufficient" cause approaches, in which the trier of fact "is invited to make an estimate concerning facts that concededly never existed." Malone, *supra*, 9 Stan. L. Rev. at 67; see also W. Keeton et al., *supra*, at 265.

(b) The "substantial factor" formulation was developed, in large part, in recognition of the proposition that "in the law 'cause in fact' (as it was once called), like proximate cause, is in the end a functional concept designed to achieve human goals." Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 69, 107 (1975). In particular, the "substantial factor" formulation permits factfinders to adjust the tightness of the required relationship between the defendant's conduct and the plaintiff's injury to reflect the strength and the nature of the policy expressed in the relevant legal rule. See Malone, *supra*, 9 Stan. L. Rev. at 91 & *passim*. As such, the "substantial factor" approach reflects a broader recognition that cause concepts cannot be articulated in a policy vacuum:

The question in a particular case as to whether the relationship between the defendant's conduct and the plaintiff's harm is close enough to warrant application of the pertinent rule of law requires the court to determine whether the rule was designed to protect against the type of injury suffered by the plaintiff. This answer is influenced by the court's reading

ample], [i]f the fire started by plaintiff was sizeable and merges with another fire, why must the court require the jury to make an estimate at plaintiff's risk as to whether defendant's fire would have worked the same destruction unaided? If the flames he caused to be put in motion were actively playing a part, is it not enough to inquire whether that part was sufficient to warrant an imposition of liability? This can be adequately expressed through the use of the term "substantial". . . . No further safeguard is needed. [*Id.*]



of how "exacting" or strict the rule of law is. Moreover, where the defendant's act is intentional rather than negligent, the courts are apt to be satisfied with a relationship more tenuous than one they would otherwise require. The willingness of courts in the tort area to view 'cause-in-fact' from a goal oriented perspective and to shape it to respond to changing social needs is reflected in myriad decisions, ranging from the well-known *Summers v. Tice* 33 Cal. 2d 80, 199 P.2d 1 (1948) to recent developments in the products liability field fashioning novel theories of enterprise and market share liability to provide recoveries not contemplated by traditional causation doctrine. [Brodin, *supra*, 82 Col L. Rev. at 313-14.]

Of particular relevance here is the stress in the recent tort case law on identifying the risk to which the defendant's actions improperly exposed the plaintiff, and adjusting the causation concept (as we argue above should be done under Title VII) to that risk.<sup>18</sup>

(c) As one of the ways of adjusting causation concepts to the legal rule's underlying policy, courts in tort cases have altered the ordinary burden of proof as to causation. For example, *Summers v. Tice*, 33 Cal. 2d 80 (1948) involved a situation in which there were two negligent gunmen, each of whom shot at the plaintiff. Because of the difficulty in establishing which gun fired the wounding bullet, the court placed on each defendant the responsibility of proving that he was *not* the respon-

<sup>18</sup> Perhaps the most noteworthy examples of this approach are the "chance of life" cases, in which the defendant's actions reduced the chance that a plaintiff would survive when those chances were already less than fifty percent. Rather than asking, as a "but for" approach would, whether absent the defendant's negligence, the plaintiff would more likely than not have survived, several courts have viewed the increased risk of harm due to defendant's conduct as sufficient to demonstrate that the defendant's negligence was a "substantial factor" in causing the plaintiff's death. *E.g.*, *Herskovits v. Group Health Insurance*, 664 P. 2d 474 (Wash. 1983); *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966).

sible gunman. This is just one of several examples in which recent tort decisions shifted the burden of proof on causation to the defendant because of the unfairness, for various reasons, of placing that burden on the plaintiff. *See also, e.g.*, *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756 (1970); *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 *cert. denied* 469 U.S. 826 (1984).<sup>19</sup>

<sup>19</sup> Thus, even if it were *not* true, as we argue above, that the *Mt. Healthy/Transportation Management* approach is best viewed as shifting the burden of persuasion on causation only after liability is established, there is no insurmountable common law barrier to shifting the burden to the defendant at the liability stage for many of the same policy reasons that justify, in our view, regarding the cause of action to be established without demonstrating an effect upon a particular employment decision. *See Transportation Management, supra*, 462 U.S. at 403 ("The employer is a wrongdoer; he acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.").

It is worth noting as well that there is yet one more approach to the mixed motive causation problem that yields basically the same result argued for in the text. That approach views the problem as presenting a harmless error issue, in the same sense that complaints about the bias of an administrative or judicial factfinder, or reliance on impermissible evidence, raises such an issue. *Cf. Johnson v. Reed*, 609 F.2d 784 (5th Cir. 1980).

Where harmless error issues are raised, whether in criminal or civil law, the placing of the burden of proof and the standard of proof applied depends primarily on the nature of the procedural violation; the stronger the norm violated, the more likely it is that the burden of proving harmless error will be placed upon the party seeking to preserve the tainted result. *See Chapman v. California*, 386 U.S. 18, 23 (1967); *United States v. Argentine*, 814 F.2d 783 (1st Cir. 1987); *Haddad v. Lockheed California Corp.*, 720 F.2d 1454 (9th Cir. 1983) and cases cited; *Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 446 (6th Cir. 1980); *cf. McCandless v. United States*, 298 U.S. 342 (1936).

In this instance, as we have seen, the very premise of Title VII is that sex-based or race-based decisionmaking is fundamentally unfair to the individuals affected and socially destructive. Under

The upshot of the foregoing foray into tort law is not that this Court, in this case or any other, should attempt to model the Title VII law of causation on the latest tort law analysis. Rather, the point is that contemporary tort law does *not* take the rigid approach to cause issues suggested by either Price Waterhouse or by the United States, but instead develops doctrine in response to the very sorts of considerations we argued earlier are pertinent under Title VII. And modern tort doctrine supports the conclusion implicit in Title VII itself: The essentials of a cause of action under Title VII can be established in a mixed motive situation by showing that sex or some other proscribed consideration played a negative role in the decisionmaking process concerning a term, condition, or privilege of employment. Whether or not that adverse effect was enough to make a difference as to a *particular* employment decision is a question going to remedy and not to liability.

#### V. The Title VII Burden of Proof Issues Presented Here

As we have seen, this Court in *Mt. Healthy* created, and in *Transportation Management* approved, rules which allow a defendant who has committed a wrong to demonstrate that the wrong does not warrant certain relief. At the same time, those two cases explicitly approve placing the burden of persuasion on the defendant who endeavors to take advantage of the opportunity to avoid remedial relief. *Mt. Healthy*, 429 U.S. at 287; *Transportation Management*, 462 U.S. at 403. In effect, the Court shifted to the defendant the very real risk that

those circumstances, it appears that shifting the burden of persuasion to the defendant to prove, convincingly, that the defect in the decisionmaking process was harmless would be justified, and that in the absence of such proof the decision actually made could not stand. In other words, the result should be the same as it would be if a party were attempting to void the results of a decision made by a judge proven to have taken race into account in reaching his or her decision.

it will be difficult to persuade a trier of fact as to what would have happened if what actually happened had not happened.

The Court has concluded, in other word. that the wrongdoer seeking to escape providing the plaintiff relief must at least "bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946); see also *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931); *NLRB v. Remington Rand, Inc.*, 94 F.2d 862 (2d Cir.) (L. Hand, J.), *cert. denied*, 304 U.S. 576 (1938). This uncertainty, it bears noting, is considerably greater where, as in these cases, human motivation rather than physical causation is in question; while physical occurrences tend to follow rules of cause and effect that are at least theoretically ascertainable, the same cannot be said of the complexities of human thought and behavior.

There is, in all these regards, no basis for distinguishing the situation under the Constitution and the NLRA from that under Title VII.<sup>20</sup> The court of appeals decision in this case, however, could be said to go beyond the language of *Mt. Healthy* and of *Transportation Management* in one respect: the court below held that a clear and convincing standard of evidence applies.

We submit that, however the requirement is phrased, in this species of cases, the burden of persuasion imposed should be sufficient to assure as a *practical matter* that

<sup>20</sup> The suggestion by the United States (Gov. Br. at 23) that such a defense is mandated by § 706(g) of Title VII is surely in error. The part of § 706(g) forbidding affirmative relief and back pay if the employment decision was "for any reason other than discrimination" is modelled on § 10(c) of the NLRA. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 n.11 (1975). And the parallel language in § 10(c) was construed in *Transportation Management* as "not meant to apply to cases in which both legitimate and illegitimate causes contributed to the discharge. . . ." 462 U.S. at 401 n.6.



the risk of uncertainty is born by the wrongdoer. That, for example, is the NLRB's practice.

Thus, the Board requires that the evidence presented by the employer to prove that the same decision would have been made through untainted decision-making must be more than simply testimonial attestations as to what would have been done absent a discriminatory motive. See *McLane/Western, Inc. v. NLRB*, 827 F.2d 1423, 1425 (10th Cir. 1987); *NLRB v. Searle Auto Glass, Inc.*, 762 F.2d 769, 774 (9th Cir. 1985); *NLRB v. Horizon Air Services, Inc.*, 761 F.2d 22, 27 (1st Cir. 1985); *NLRB v. Townsend and Bottum, Inc.*, 722 F.2d 297, 302 (6th Cir. 1983). Similarly, where it is an established policy that is relied upon to prove what would have happened in the absence of a discriminatory motive, the Board has generally required clear evidence that the policy existed, that the policy applied to the situation at hand, and, as well, that the policy was strictly and uniformly enforced. *McLane/Western, Inc. v. NLRB, supra*, 827 F.2d at 1425 & n.5; *Airborne Freight Corp. v. NLRB*, 728 F.2d 357, 358 (6th Cir. 1984); *A&T Manufacturing Co.*, 276 NLRB 1183 (1985); *PYA/Monarch, Inc.*, 275 NLRB 1194 (1985).

The "clear and convincing evidence" rubric used by the court of appeals seems as well adapted as any other to convey the standard that these cases actually apply, and quite properly so. That standard focusses directly on the two relevant factors in reducing the risk of uncertainty created by the employer's unlawful acts: the type of evidence presented ("clear" rather than ambiguous) and the degree of certainty that evidence conveys ("convincing" rather than equivocal). Where, as here, the appropriate alternative would be not a lower standard of proof but eliminating the counter-to-fact proof altogether, the defendant is in no position to complain. See also *Albemarle Paper Co. v. Moody*, 422 U.S. 421 (backpay should be denied under Title VII "only for reasons which, if applied

generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.").

### CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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